SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

■

No. 66

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HAYDEN C. COVINGTON
GROVER C. POWELL CURRAN E. COOLEY
Counsel for Petitioner

■

No. 292

WILLIAM MURRAY ESTEP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

HAYDEN C. COVINGTON
Counsel for Petitioner

■

JOINT BRIEF FOR PETITIONERS

"The new despotism"

"Administrative 'law' in this country is not really a system at all, but is simply an exercise of arbitrary power in relation to certain matters which are specified or indicated by statute, not on any definite principle, but haphazard, on the theory, presumably, that such matters are better kept outside the control of the Courts, and left to the uncontrolled discretion of the Executive and its servants.

". . . The victim is, in such a case, perfectly helpless, and entirely without remedy. He is completely at the mercy of a person who, for all he knows, may be a bureaucratic tyrant. If he did attempt to challenge the decision by proceedings in a Court of Law, he might well be told by the Court that it must be presumed that the Minister acted in good faith, and in such circumstances the presumption is irrebuttable.

". . . It is inconceivable that such legislation would be passed, at all events without protest, if the legislators knew that they were sapping the foundations of the Constitution. . . . Arbitrary power is certain in the long run to become despotism, and there is danger, if the so-called method of administrative 'law', which is essentially lawlessness, is greatly extended, of the loss of those hardly won liberties which it has taken centuries to establish."—Hewart, Lord Chief Justice of England, *The New Despotism*, Ernest Benn, Ltd., London, 1929, pp. 46, 49-50, 52.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

■

No. 66

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

■

Jurisdiction

This court has jurisdiction of this case pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered April 4, 1945. (68) This court granted petition for writ of certiorari May 28, 1945. (67)*

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. (56-67) It is reported at 148 F. 2d 288.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 601.5, 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2,

* Figures appearing in parentheses in this brief refer to pages of the printed transcript of the record.

623.21, 623.61, 625.1, 625.2, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations* (32 C. F. R. Supp. 601.5 *et. seq.*) promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of Bills of Attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

1. Does the undisputed evidence show that the petitioner is not guilty of failing to report for induction where it appears that he was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board and he subsequently appeared at the induction station, joined the group of inductees sent from his local board, submitted to the physical examination, was accepted by the armed forces, refused to take the oath of allegiance, was fingerprinted, was granted a furlough and subsequently court-martialed for failure to perform military duty?

2. Does the conceded fact that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board for induction, constitute a valid defense to the indictment charging him with criminal failure to appear at the local board?

3. Did the appearance of petitioner at the induction station, pursuant to the order to report, and his failure to submit to induction constitute a failure to report for induction within the meaning of the Act and Regulations?

* The Regulations are amended frequently. The sections here set out are as they existed when the facts in controversy took place.

4. Did the intent on the part of petitioner not to report for induction justify the conviction in spite of the fact that he was imprisoned at the time he was required to report and later appeared at the induction station and submitted to the administrative process up to the point of refusal to submit to induction?

5. Did the trial court err in charging the jury that petitioner's false imprisonment was immaterial if he intended not to report, and if after the restraint was removed he refused to comply with the order to report, and in declining to give petitioner's requested instruction presenting the issue of whether he reported for induction by appearing at the induction station and following through with the procedure to the point of refusing to be inducted?

6. Does acceptance by the armed forces at the induction station complete the administrative process so as to permit judicial review of the illegal classification in defense to the indictment based on petitioner's failure to report at the local board as specified in the induction order?

7. Did the trial court err in refusing to allow petitioner the right to show, and in refusing to permit the jury to consider, the order on which the indictment was based as void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

8. Did the trial court err in charging the jury that it could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided by the jury to whether or not petitioner knowingly failed to report at the local board as specified in the induction order?

9. Did the trial court err in refusing to give petitioner requested charges permitting the jury to consider whether or not the boards had acted in an illegal and unconstitutional manner in classifying petitioner and in ordering him to report for induction?

Statement of Smith Case

FORM OF ACTION

This criminal action was begun by indictment returned against petitioner, Louis Dabney Smith, in the United States District Court of the Eastern District of South Carolina, Columbia Division, on November 7, 1944. (2) Defendant was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940, as amended, and the Regulations promulgated thereunder, in that on September 30, 1943, he "unlawfully, knowingly and wilfully failed and neglected to . . . report for induction as ordered by the said local board." (2-3)

Petitioner urged a plea in bar, which was denied. He then urged a motion to quash (3-5) which was denied. (5) Upon a plea of "not guilty" (6) trial to a jury began on November 9, 1944, before the court. At the close of all the evidence, petitioner moved for a directed verdict of "not guilty", in which the reasons were extensively stated. (25-28) On denial thereof, petitioner duly excepted. At the close of all the evidence, petitioner submitted to the court his requested charges. (35-38) Counsel summed up the evidence and the court charged the jury. (28-40) Petitioner objected and excepted to the court's charge. (40-41) The court refused certain of petitioner's requested charges with exceptions to petitioner. (35-41) The jury returned a verdict of "guilty". (41) Thereafter, on November 10, 1944, petitioner was sentenced to three and one-half years and committed to the custody of the Attorney General for confinement in a federal institution. (1)

FACTS

Louis Dabney Smith is a minister of Jehovah's witnesses and has been for several years. (9) For four years prior to the filing of his Selective Service questionnaire, he had been a minister preaching from house to house in the same manner as did Christ Jesus and His apostles, as shown at Acts 20:20 and Luke 8:1. He had been formally ordained. The record also disclosed that he was eighteen years of age on October 4, 1942; that he registered with his local board during the week of December 18, 1942; filed his questionnaire with which he submitted proof of his ministry; that he was living with his parents, receiving support from them; and that he was a student at the University of South Carolina. (Defendant's Exhibit A for Identification) (7) (See 53 F. Supp. 582)

After considering the evidence, the local board placed him in Class I-A on April 2, 1943. He was granted a personal appearance before the board, and on May 18, 1943, the local board continued his I-A classification. On May 25, 1943, he appealed for class IV-D to the board of appeal, and on June 17, 1943, such board affirmed the classification by a vote of 4 to 1. On June 22, 1943, he appealed to the President and the classification was affirmed. On September 18, 1943, he was ordered to report for induction on September 30, 1943. (Defendant's Exhibit A for Identification) (7) (See 53 F. Supp. 582)

Petitioner's father suspected that he might be planning to refuse to report for induction on September 30, 1943 (22, 23), and about three days prior thereto he went to the local board and asked that the board have two detectives come to his home and take the petitioner to the induction station, but was informed that the local board had no police authority. (22) Thereupon, the father paid a magistrate a sum of money to arrange to forcibly take petitioner to Fort Jackson, South Carolina, on September 30, 1943, and there deliver him for induction. (23)

On the morning of September 30, 1943, between 8 and 8:30 o'clock, the magistrate and two policemen drove up in the driveway of the Smith home. Petitioner's mother saw them as they got out of the car and started toward the house. (21, 24) She ran upstairs to the bathroom where petitioner was shaving and preparing to dress, and by the time she reached there, the three men had entered the home and were behind her. (11) When petitioner came out of the bathroom he asked the men if they had a warrant for his arrest, and they told him that they needed no warrant. One of the men pulled up his coat and displayed a pistol and commanded petitioner to accompany them. (12) Thinking they were federal agents, and that he was under arrest and in their custody petitioner surrendered himself to them. (12)

The officers placed petitioner in the car and drove him to the induction station at Fort Jackson, where they turned him over to the military authorities. (12-13) Petitioner told the authorities that he was a minister of the gospel and had been wrongly classified. (13, 15) The sergeant at the desk at the induction station then telephoned Mr. Leonard, the clerk of the local board, verified petitioner's classification and informed the clerk that petitioner was then at the induction station. (13) He asked the clerk whether petitioner was supposed to be inducted into the army that day. On trial petitioner testified that the sergeant told him "that Mr. Leonard said I was supposed to be inducted into the army that day. Q. And did he say that he should send you back over to the board to be transported back to Fort Jackson? A. No, sir." (13-14)

Petitioner was then taken to another building at the fort, where he awaited the arrival of the other men from the induction center. (14) He was then put with this group of men and given a final physical examination in due course. He remained with this group until he was notified that he had passed the physical examination and was declared acceptable for the armed forces. (15) Then he was given

opportunity to choose between the army and navy. He replied that he chose neither, because he was exempt from service as a minister of religion and that he could not be inducted into the army. (15) He was then fingerprinted and questioned about his occupation, family and home. (15) He informed them that his local board was prejudiced against him, and because of such prejudice they refused to classify him as a minister. (15, 16) Petitioner was taken with a group to another building where the oath of allegiance was to be read. (16) He indicated to the officer in charge that he would not take the oath. (16) Thereupon provision of the Articles of War covering men who refused to take the oath was read to petitioner. Then he was informed that regardless of whether he took the oath or not, he was subject to the Articles of War and in the army. (16) Petitioner still refused to take the oath and submit to induction and was again informed that he was subject to the Articles of War. (17) He was further informed that he was being given a 21-day furlough, but that he was subject to the Articles of War and failing to return he would be liable for punishment because of being absent without leave, which would be desertion. (17) He was permitted to leave Fort Jackson on October 1, 1943. (17) At the end of the 21 days he returned to the Fort and asked permission to see the commanding officer at the reception center. (18) He saw the officer and told him that he was a minister of Jehovah's witnesses; that he was deprived of a IV-D classification because of prejudice on the part of the local board (18); that he was brought to the induction station against his will, and desired to be released. He was informed that he would not be released, whereupon petitioner told the officer that his obligation and mission in life was the preaching of the gospel of God's Kingdom, and that he had so consecrated his life to do the will of Almighty God. (19) Petitioner was then taken to the infirmary and then, on his refusal to wear the uniform, the officers in charge attempted to force the uniform on him. (19) For disobeying the orders

of the sergeant and other officers, he was charged with violating the Articles of War, court-martialed and sentenced to serve 25 years in prison. (19)

Thereafter petitioner filed in the district court a petition for writ of habeas corpus, alleging that the army was without jurisdiction, since he was not legally inducted into the army, not having subscribed to the formal military oath. The district court discharged the petition for the writ and remanded petitioner to custody of the military authorities. (*Smith* v. *Richart, Colonel,* 53 F. Supp. 582)

Petitioner duly appealed to the circuit court of appeals. Because his case was governed by *Billings* v. *Truesdell,* 321 U. S. 542, counsel stipulated for reversal of the judgment and pursuant thereto the circuit court of appeals ordered petitioner discharged. He was released from military custody. Soon thereafter these criminal proceedings were instituted. (19)

HOW ISSUES RAISED

Petitioner challenged the sufficiency of the indictment by motion to quash. He contended that it failed to definitely and sufficiently apprise him of the nature of the order and regulation under the Act that he was charged with violating. (3)

In that same motion defendant asserted that the administrative process had been completed so as to allow him to attack the illegality of the action of the draft boards on which the indictment was based. (3-4) He asserted that he had been examined under the Act and declared acceptable by the armed forces. Also, he claimed that he had *reported* for induction but had *refused to submit* to induction as a condition precedent to challenging the validity of the administrative action. (3) He contended that if the right to urge this defense was denied him, a construction had been placed on the Act and Regulations which made them unconstitutional. (4) Petitioner alleged that as construed

they were void because by such construction they were transformed into a Bill of Attainder, contrary to clause 3 in section 9 of Article I of the Constitution; surrendered the judicial powers to the draft board, contrary to Article III of the Constitution; denied the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment to the Constitution; denied the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Sixth Amendment to the Constitution; permitted conviction without evidence of guilt and upon hearsay evidence, and denied right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments to the Constitution. (4) The court overruled the motion to quash. (5)

The trial court refused to review the determination of the draft boards to ascertain whether or not the defendant had been deprived of his rights under the Act. In first making its holding the court excluded the questionnaire offered by defendant. (8) He attempted to offer oral evidence *de novo* as to his ministerial training and activity as a regular minister of religion under the Act and Regulations. (9) The court excluded that offer of proof on the ground that it was an attack against the action of the draft boards according to the decisions of this court. (9) Petitioner attempted to make an extensive offer of proof by answering questions relative to his background and activity as a minister of religion. This was refused by the court. (10)

The court limited the issues to be determined by the jury, declaring that they were (a) whether petitioner was classified, (b) whether petitioner was ordered to report for induction, and (c) whether petitioner failed to report for induction pursuant to the order. The court said: "This court and this jury have nothing to do with whether he was properly classified or not."

At the close of all the evidence the court held that it

had no jurisdiction to review the action of the administrative agency, to determine whether its action was legal; and that the court and jury must accept the classification and orders of the draft boards as final. (27-28)

The court declared that whether petitioner had exhausted his administrative remedies was immaterial, because in a criminal proceeding the court could not review the alleged illegality of the draft-board determinations and orders. (28)

When the evidence was concluded petitioner moved for a directed verdict on the grounds that the evidence was insufficient to sustain a conviction; that the Act had been construed and applied to petitioner by the court so as to make it unconstitutional; and that the evidence showed the order of the draft boards to be illegal. (25-26) In support of the motion it was argued, among other things, that petitioner's appearance at the induction station and his undergoing the administrative process, to the point of refusing to submit to induction, constituted reporting for induction, which rendered immaterial his failure to report at the local board. (26-27) The court overruled the motion, holding there was sufficient evidence to submit the case to the jury. (28)

The court charged the jury. (28-35, 38-41) The court submitted the case to the jury on the theory that the petitioner had failed to report at the local board and, with no intention to perform his duties, stayed away. (31-32) Concerning the undisputed evidence showing that petitioner was falsely imprisoned at the time he was required to report at the local board, the court said: "That would be a good defense so long as the restraint exists, but it would not relieve of the duty and responsibility of performing said duty when the restraint was removed." (32) The court told the jury that it was for them to decide whether the physical restraint had anything to do with petitioner's not reporting for induction. (32) The court emphasized that the restraint had nothing whatever to do with his induction.

by stating a hypothetical case, saying: "If it is my duty to go down in front of this Court House at a given hour, and before and at the time it is my duty to go I have no intention of doing so and would not do so, the mere fact that somebody may have laid hands on me and held me temporarily might have nothing in the world to do with my absence in front of the Court House where I was supposed to go, but if it did, if I decided that I would not go, and then changed my mind and decided I would go, then my duty called me there as soon as that restraint was removed." (32)

Moreover, the court informed the jury that the fact that a selectee might be rejected after he reported for induction "does not operate to relieve the selectee or inductee from the duty of reporting for induction." (32) This was immediately reiterated by the court to re-emphasize the petitioner's duty to report. (32-33) The court again informed the jury in the charge that the determination of the draft board must be accepted as final. "We have no authority, neither you nor I, to go behind it." (33)

The court also charged the jury that "it makes no difference what his purpose was, if he deliberately and intentionally neglected to perform a duty required of him under the law, knowing that it had been required, for that would meet the requirement of the law." (35) Exception was taken to the court's charge that the defendant could be guilty ("when he is conscious of and knows of the duty to do that which is required of him") (31) on the ground that it nullified the defense of false imprisonment at the time he was ordered to report because it "could include a person who was physically restrained and unable to comply."(40)

The hypothetical illustration given by the court in the charge was excepted to. (40-41) The court then reiterated its hypothetical illustration in these words:

"The Court: I meant to say, and think I did say, if I was required to go to the front of the building, had no intention of going there before the time or at the time,

although somebody might have put their hands upon me physically and held me, and that had nothing to do with preventing my absence, then it would not excuse me.

"Mr. Cooley: Your Honor please, the point we want to call your attention to is that the defendant himself, in order to be guilty of the failure, he must be able to perform.

"The Court: That is a matter for the defense. The Government does not have to prove that he is able to perform. He has offered no evidence that he wasn't able to perform other than that about which I have charged." (41)

The court informed the jury that "there is practically no difference as to the facts. . . . The particular issue as to the facts, it seems to the court, arises out of the interpretation that is to be placed upon facts, most of which is conceded." (38)

Petitioner duly tendered requested charges, presenting the defense of his being exempt from all training and service under the Act as a minister of religion, so as to deprive the draft boards of authority to order him to do training and service under the Act by reason of such statutory exemption. (36)

Also the court was requested to charge the jury to determine whether the draft boards arbitrarily and capriciously failed to consider proof submitted by petitioner that he was exempt as a minister of religion, and whether the draft boards had no substantial evidence or proof disputing his claim for exemption as a minister of religion. (37) These charges were refused. (36-37)

The court was requested to charge the jury that presence of the petitioner at the induction station and his undergoing the prescribed procedure there with the other selectees, after reporting, to the point of refusing to submit to induction, constituted *reporting for induction,* and that the petitioner could not be convicted of the offense of "failure to report for induction." (37) This requested charge was also refused. (37)

Specification of Errors

Petitioner Smith relies upon every one of his assignments of error as grounds for a reversal of the conviction. (See typewritten transcript of the record.)

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[Points for JOINT ARGUMENT of *Smith* and *Estep* cases appear at pages 38-40, *infra.*]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

■

No. 292

WILLIAM MURRAY ESTEP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

■

Jurisdiction

This court has jurisdiction of this case pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the circuit court of appeals was entered July 6, 1945. (68) This court granted petition for writ of certiorari October 8, 1945.

Opinions Below

The opinion of the circuit court of appeals appears in the record. (281-289) It is reported at 150 F. 2d 768. The dissenting opinions also appear in the record. (289-306) They also appear in the Federal Reporter, Vol. 150, at pages 773-781.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 601.5, 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 626.3, 627.12, 627.13, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations * (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of Bills of Attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

(1) Does reporting at the induction station pursuant to the order and refusing to submit to induction by stepping forward after acceptance by the armed forces constitute exhaustion of the administrative process so as to qualify petitioner for a defense to the indictment?

(2) Where the undisputed evidence shows that peti-

* The Regulations are amended frequently. The sections here set out are as they existed when the facts in controversy took place.

tioner's rights to procedural due process on appeal have been denied him by the local board so as to prevent the appeal board from properly exercising its rights under the Act and regulations, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally and that the order on which the indictment was based is void?

(3) May the petitioner who is a minister of religion, exempt from all training and service by provision of the Act, show in defense to the indictment that his constitutional rights have been violated by the board's action in excess of its jurisdiction or authority and contrary to the Act and Regulations?

(4) Did the trial court err in refusing to allow petitioner the right to show, and in refusing the jury the right to consider that the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(5) Did the trial court err in holding that it and the jury could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided to whether or not petitioner knowingly failed to submit to induction, as specified in the order to report?

(6) Does the construction placed upon the Act and Regulations by the court below, requiring petitioner to report and submit to induction, and apply for a writ of habeas corpus as a condition precedent to judicial review of the illegality and unconstitutionality of the action by the board, violate Clause 3, Section 9 of Article I, and Article

III, of the United States Constitution and the Fifth and Sixth Amendments thereto?

(7) Did the trial court err in denying petitioner's motion to quash the indictment, motion for an instructed verdict and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for charges, all of which pertained to the illegality of the administrative order?

(8) Did the courts below err in holding that the only method of attack against an illegal and unconstitutional action of the draft boards was by application for writ of habeas corpus?

Statement of Estep Case

FORM OF ACTION

This criminal action was instituted in the court below by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. (1)

The indictment charged that petitioner, a registrant classified for training and service in the armed forces, "did unlawfully, wilfully and knowingly fail and refuse to submit to induction; he, the said defendant, having no valid reason for having failed and refused to perform the duty as aforesaid, in violation of the directions given the said defendant under rules and regulations made pursuant to the Selective Training and Service Act of 1940, as amended." (1)

Thereafter petitioner pleaded "not guilty". (277) Petitioner filed a motion to quash the indictment on the grounds that the construction placed upon the criminal sanctions clause so as to deny him his right to show, in defense to the indictment, that the orders of the draft boards were void and illegal, violated the Constitution of the United States. (2-4, 277) The motion to quash was overruled, after argument to the court, on December 6, 1944. (4, 277) The trial to a jury before the court began on De-

cember 7, 1944. (5, 277) The court excluded and received evidence upon the trial. The case closed when all the evidence was in on December 7, 1944. (113, 278) At the close of the evidence, the petitioner moved for dismissal of the indictment and for a judgment of acquittal (113-116), and for a directed verdict of not guilty. (116-120) In these motions the reasons were stated extensively. (113-120) The motions were denied and exceptions allowed to petitioner. (120-121) Petitioner duly submitted to court, before argument of counsel to the jury, his requested instructions to the jury. (121, 123-145)

On December 8, 1944, the cause was argued to the jury by counsel. (146, 278) Thereupon the court charged the jury. (146-148) The court refused all of petitioner's requested charges to the jury and allowed exceptions to his ruling. (148-149) Petitioner duly objected and excepted to the court's charge. (149-154) The jury retired to consider the verdict at 11:06 am. (154) At 4 pm the jury sent a message to the court that the jurors were hopelessly deadlocked and could not reach a verdict. (154) Thereupon the petitioner waived his constitutional right to a unanimous verdict and agreed to have the issue of his guilt decided by a majority verdict. Counsel for the parties so stipulated which was approved by the court. (154-155) The jury thereupon rendered its verdict of guilty on December 8, 1944. (155-156) Eleven jurors were for conviction, one for acquittal. (156) On December 20, 1944 the United States District Judge rendered judgment upon the verdict of the jury and sentenced petitioner, committing him to the custody of the Attorney General for a period of five years. (160, 249, 278)

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. (250-253, 278) He timely filed his assignments of error which support each ground of this petition. (253-276) In due course the case was argued and submitted to the United States Circuit Court of Appeals for the Third Circuit. It was reargued

before six judges of the court sitting *en banc* May 31, 1945. The judgment of conviction was affirmed by that court on July 6, 1945. (289, 307)

FACTS *

The petitioner, now 22 years of age, registered under the Selective Training and Service Act of 1940, on June 30, 1942, with Local Board No. 4 of Washington County, Pennsylvania. (6, 97, 243) He was thereupon assigned order number 11918 by said board. (243) Petitioner timely filed a Selective Service Questionnaire on August 22, 1942, answering the questions required of him. (6, 161-165) In Series VIII he stated he was a minister of religion, did customarily serve as a minister and had been a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses since 1936. (163) He stated that he was ordained as a full-time pioneer minister on October 1, 1941. (163) In said questionnaire he claimed classification of IV-D exempting him as a minister of religion under Section 5 (d) of the Act. (164)

Also filed by Estep was a Special Form for Conscientious Objector properly filled out, which contained additional evidence as to his training for the ministry and his activity as a minister. (194-199) Estep showed that he had attended the Third Ward School at Canonsburg, Pennsylvania, from 1928 to 1935, when he was expelled from said school because of his failure to salute the American flag, contrary to his conscientious convictions. (75, 196) Thereupon he enrolled in the Gates Kingdom School operated by Jehovah's witnesses and located at Gates, Pennsylvania. (196-197) In this school he pursued the regular subjects, generally taught in the public schools, until 1940 when he graduated after successfully completing all courses, including the 12th grade. (77-78) Moreover, he additionally attended the special course of study prescribed by such school

* A more abbreviated statement of the facts appears in the opinion, record pages 290-294.

for the training of young men who desired to prepare for the ministry. He pursued this course from 1935 to 1940. (78) He filed with the local board his own written statement giving details as to his ministerial work, also a sworn certificate of ordination issued by the Watchtower Bible and Tract Society, certifying that he was a full-time pioneer minister and had been acting as such since October 1, 1941. (190-191, 192, 213)

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that the petitioner did not devote substantially all of his time to the performance of his missionary evangelistic work. There was no evidence that he did not fit, as a minister of religion, Opinion No. 14 of National Headquarters of Selective Service concerning ministerial status of Jehovah's witnesses; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. The Report of Physical Examination and Induction (D.S.S. Form 221), Defendant's Exhibit S, under Occupation and Industry, shows that he is a "minister—Perform Missionary and Evangelical services in organizing churches". (160-245)

The local board denied his claim for exemption on October 3, 1942, and placed him in Class I-A, making him liable for training and service in the armed forces. (6, 164) Petitioner filed additional evidence and duly and timely requested a personal appearance, which was granted for October 21, 1942. (98, 99, 193) After such personal appearance the local board continued him in Class I-A. (99, 212) On October 23, 1942, Estep appealed to the board of appeal, asking for classification as a minister exempt from all training and service. (7, 9, 99, 213)

Estep's appeal was taken October 27, 1942. (9) The file was not forwarded from the local board until July 28, 1944. (9) He went to the local board on or about October 27, 1942, and offered to file his written statement of appeal and three affidavits supporting same. (24-25, 99-100, 169-172, 175-181) The local board clerk *falsely* informed him that his file had been forwarded to the board of appeal, when at the time he made the statement he knew that petitioner's file was in the possession of the local board and had not been sent to the board of appeal. (5-17)

The clerk admitted that he lied to defendant for the purpose of depriving him of his right to have his case reopened and to submit the additional evidence to be filed in his Cover Sheet and withholding the same from the Board of Appeal. (15-16)

Sometime after December, 1942, through some irregularity or mistake Estep's Cover Sheet was misplaced or lost by the local board. It was not found until February 1944. (9, 14) Petitioner during this time, relying on the statement of the local board clerk, believed that his file was with the board of appeal. After his file was lost the regulations were amended so as to prevent the file from being forwarded to the board of appeal until the registrant had taken a pre-induction physical examination to determine his physical condition. If his physical examination revealed that he was not fit for service his classification would be changed. (Reg. 627.14) On April 19, 1944, he was ordered to report for preinduction physical examination on April 28, 1944. (101, 220) He complied with such order and was accepted for military training and service and assigned to the Naval Forces. (101, 221) He then learned for the first time since November 1942 that his file was not with and had never been sent to the board of appeal. He then examined his file and found part of the evidence missing. He then obtained eight additional affidavits showing that he had continued his full-time ministry and stood in relation to Jehovah's witnesses the same as do the orthodox clergy of the

recognized religious denominations to their congregations. (101-103) He also obtained copies of the missing documents, placed them with the affidavits the board had refused to accept and place in his Cover Sheet in 1942, and some additional affidavits he obtained in 1944 and, on May 23, 1944 by registered mail, he sent all this proof to the local board, together with a covering letter requesting that they be placed in his Cover Sheet for reconsideration by the local board and forwarded along with his file to the board of appeal. (101-103) At that time his file was still with the local board, and was not forwarded to the board of appeal until July 28, 1944. (9, 222) However, the local board declined to reopen his case and did not place the additional evidence received from the petitioner by registered mail on or about May 23, 1944, in his Cover Sheet, and did not forward the same to the board of appeal. (11, 15-16) Although these documents were in the possession of the local board, they were never seen by the board of appeal, the State Headquarters or the National Headquarters of Selective Service System. (11-12)

The local board prepared and filed its written arguments against the case of petitioner with the board of appeal contrary to the Regulations. (29, 29-30, 58-59, 223) This letter from the local board was considered by the board of appeal, and the classification of I-A was given largely because of the misleading and prejudicial statements made by the local board to the board of appeal. (63) On August 28, 1944, the board of appeal, not considering the evidence rejected by the Local Board, classified petitioner in Class I-A making him liable for training and service in the armed forces. (7, 103, 165)

It was offered to be proved by the chairman of the local board that the local board withheld from the consideration of the board of appeal this additional evidence. (57-58) It was offered to be shown by the chairman of the board of appeal that if the local board had included this evidence in the file it would have been considered by the board of appeal

with a different result in the classification of petitioner. (63) Both offers were rejected by the trial court.

The Pennsylvania State Headquarters of Selective Service requested additional information as to Estep's ministerial activity, even after the board of appeal had affirmed the action of the local board. The local board, in compliance with this request, took a short statement from petitioner and refused to send up the voluminous amount of evidence which it had previously refused and withheld from the board of appeal. (226-227) See comment of the State Headquarters as to the illegality of the action of the local board in this connection. (228) Moreover, it should be observed that the local board placed additional information in Estep's file after his 1942 appeal had been taken, which information was the prejudicial, anonymous letter with newspaper clipping attached. (218-219) Those two papers were placed in the file after the board had turned down Estep's request made in October 1942 to add *his* additional evidence.

Estep communicated with the Pennsylvania and National Headquarters of Selective Service requesting review of his file and an appeal to the President of the United States in his behalf. (103, 229-231) This was declined. (232-233) Petitioner received a notice to report for induction on September 11, 1944. (8, 165-166) He reported for induction on such date as directed. (8, 31, 103) He was sent by the local board to the induction station at the Old Post Office Building in Pittsburgh. (103-104) He arrived there on September 11, 1944 at 9 am. He was questioned as to his occupation and background. (104) He informed the woman clerk, who recorded his replies, that he was a full-time ordained minister of the gospel and missionary evangelist, preaching from house to house as did Christ Jesus and the apostles, that he would obey all the laws of the land consistent with God's law. (104-105) He was then questioned by doctors who gave him a physical examination, upon completion of which he was again declared physically and

mentally fit for training and service and his acceptance of April 1944 confirmed. (105-106) One of the doctors attempted to persuade him to submit to induction and obtain a commission as a chaplain in the Navy. (105-106) He informed the doctor that Jehovah's witnesses were ambassadors of God's Theocratic Government, requiring them to be strictly neutral. He said he was a soldier in the army of Christ, wearing the uniform of Christ Jesus and using the weapons Christ Jesus had prescribed, namely, the 'sword of the spirit, which is the word of God' (105-106), and that it was impossible for him to serve in two armies at the same time. (105) He was then requested by an officer to state what branch of the Navy he cared to go into. He declined to make a choice, explaining again that he was an ordained minister, exempt from all training and service and not required to choose. (105) He informed the officer that his entire time and energy was devoted to the proclamation of the Theocratic Kingdom in order that all people of goodwill might learn of God's provision for them to gain everlasting life on earth. (106) He was then directed to leave the induction station and return the next day. (106-107) He left at 2:30 pm, September 11, and the next morning returned to the place at the time instructed. (106-107) He refused to sign an oath that obligated him to submit to the command of the Commander-in-Chief of the armed forces of the United States, explaining that he was an ordained minister not subject to training and service in the armed forces and that the draft boards had violated the law, rather than he, that the draft board had required him to do an act which would cause him to break his covenant with Almighty God, resulting in his everlasting destruction. Estep said he told the officer that since no representative of the United States government could grant him a pardon from the punishment of everlasting death prescribed by Almighty God for him if he should break his covenant, likewise no representative of the government had authority to force him to perform an act which would result in break-

ing his covenant and everlasting death. (107-108) The officer told him that the easiest way out of the difficulty would be to go ahead and be inducted. Petitioner replied that he was not looking for the easiest way out because he was a footstep follower of Christ Jesus who admonished that all His true followers would be hated of all nations, persecuted, mistreated, imprisoned and many even killed for maintaining their integrity and thus be required to face the toughest way. (107-108) Thereupon the officer referred petitioner to Lt. Commander Elmer B. Keckler of the United States Navy, commanding officer of the Navy Recruiting and Induction station at Pittsburgh. (32-33, 107-108) He was taken before Commander Keckler who, in the presence of Chief Electrician Mate E. L. Tissue, asked petitioner what it was all about. Keckler asked Estep to sign a statement and Estep told him that he had submitted to Keckler a letter of explanation which was complete and a written record of his purpose in appearing. Keckler received the letter. (32-38, 108-109) After Estep explained why he could not submit to induction, Keckler again requested him to sign a statement and Estep again refused. (32-35, 109) Keckler sent Tissue out of the office to look for several witnesses to the refusal of petitioner to submit to induction and to refuse to sign the statement. While Tissue was gone, petitioner explained fully to Keckler the work of Jehovah's witnesses and that he was doing a work of great national importance, that he was telling the people of the Kingdom of Christ Jesus, a Theocratic Government that would be ruled by Jehovah God through his Son Christ Jesus, who would have visible representatives on the earth as princes, namely, the faithful men of old recorded in Hebrews chapter 11, who would be resurrected and brought back to earth, that all the present governments of the earth under the bondage of the greatest dictator of all times, Satan the devil, would be destroyed at the battle of Armageddon at the hands of Christ Jesus. Estep informed him that before this battle began it was necessary that the

people be warned and that he was engaged in that warning work by carrying the Gospel message of the Kingdom as a missionary evangelist to the people at their homes. (110-112) Tissue returned with the witnesses who signed the statement that petitioner refused to submit to induction after being requested to go through the induction ceremony by stepping forward and taking the oath. (110-112) The officer's statement appears in the record. (242) This the petitioner admitted he refused to do. (111)

In his letter to the commanding officer, copy of which he had filed with the local board, he stated that he was reporting because the law required him to do so; that he was an ordained minister of the Gospel, exempted from all duty but willing to obey all the laws of the United States that are in harmony with the law of God and which would not require him to give up hi ministry; that the undisputed evidence showed that he was a minister of religion within the meaning of Section 5 (d) of the Act, exempt from military training and service; that the local and appeal boards violated the law in denying him the exemption; therefore the armed forces did not have authority to require him to submit to induction. (38-39, 239-240)

After his refusal to submit to induction was properly witnessed, petitioner was directed to leave the induction station. (111-112) He returned to his home and was thereafter arrested, charged and indicted for alleged violation of the Selective Training and Service Act, as aforesaid. (112)

The draft board file, including the questionnaire, showed that petitioner was a minister and conscientiously opposed to combatant and non-combatant military service, and was properly entitled to exemption and classification as an ordained minister in Class IV-D and that the boards had acted capriciously and arbitrarily in classifying him in Class I-A over his objection, and had no jurisdiction to order him to submit to induction by taking the oath. (161-165, 190, 192, 194-199, 200-230)

There is no written proof or evidence reduced to writing which shows that petitioner was not recognized, authorized or ordained by the Watchtower Bible and Tract Society and Jehovah's witnesses. (161-230) There was no evidence that he did not devote substantially all his time to the regular performance of ministerial duties in behalf of said organization. There was no evidence that he did not perform the religious ceremonies and duties. There was no evidence that the Watchtower Bible and Tract Society did not recognize petitioner as standing in relation to it as do the ministers of the orthodox religious organizations. (161-230) There was no evidence that petitioner did not follow this profession, devote his time and preach at all times shown in his papers before the board and in the manner described by him therein. There was no written evidence in the file disputing the facts stated by him in Series VIII of the questionnaire and in the other documents filed with the board in reference to his ministerial activity. There was no evidence in the file in writing which showed that petitioner falsified his claim as a minister or that he falsely impersonated a duly recognized minister of the recognized religious organization known as Jehovah's witnesses. (161-230)

HOW ISSUES WERE RAISED.

By motion to quash the indictment petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and orders based thereon. (2-4) He asserted that if the Act and Regulations were so construed as to deny him these defenses, they were unconstitutional because a Bill of Attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution; because they surrendered the judicial power to the draft boards contrary to Article III of the Constitution; because they denied the right to a judicial trial contrary to the due process

clause of the Fifth Amendment to the United States Constitution; because they deprived the petitioner of his right of trial by jury contrary to the Sixth Amendment to the United States Constitution. (2-4, 277) The trial court overruled the motion to quash with exception to petitioner. (4, 277)

Upon cross-examination of government witness McNutt, clerk of the local board, the petitioner attempted to prove that McNutt, acting for the local board, lied to petitioner by stating that his file was with the board of appeal, for the purpose of denying petitioner his right to present additional evidence for a reconsideration by the local board of petitioner's case and for consideration by the board of appeal, and that this was a conspiracy on the part of the local board and McNutt to deprive petitioner of his constitutional rights to have a full and fair hearing before the administrative agency. (11, 16-21) The court held that petitioner did not have the right to challenge the legality of the classification and orders because he did not comply with the order of the armed forces to submit to induction. (20) Petitioner excepted to this ruling and the remarks of the court. (21)

Upon cross-examination of government witness McNutt, petitioner attempted to show that the additional documentary evidence which he offered in May 1944 to the local board for its consideration and to be placed in his Cover Sheet for forwarding to the board of appeal was unlawfully and fraudulently withheld from the board of appeal by the clerk and members of the local board as part of a conspiracy to deprive petitioner of his procedural rights under the Act, the Regulations and the due process clause of the Fifth Amendment to the United States Constitution. (24-29) The court held that unlawful and unconstitutional acts of the draft boards were not subject to judicial review in defense to the indictment charging petitioner with refusal to submit to induction. The court declared that the only issue to be decided by the jury was whether or not peti-

tioner refused to submit to induction. (27, 29) Petitioner excepted to this holding on the ground that it abridged his constitutional rights and placed a construction upon the Act and Regulations that made them contrary to the United States Constitution, for each of the reasons specified in the motion to quash. (27, 29)

The trial court also excluded from evidence over the objection of petitioner the testimony of petitioner's witness, Thomas M. Reese, chairman of the local board. If permitted to testify Reese would have said that all the evidence reduced to writing in petitioner's file showed that petitioner was a duly recognized missionary evangelistic minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a recognized religious organization under the Act; that petitioner devoted substantially his entire time to the performance of such preaching and had no occupation other than minister of the Gospel; that there was no evidence in the file disputing petitioner's claim as a missionary evangelist, representing the Watchtower Bible and Tract Society; that petitioner did not fictitiously claim exemption as a minister; that the local board could not point out from the file where petitioner did not fit Opinion No. 14 of the National Headquarters concerning classification of Jehovah's witnesses as ministers of religion under the Act and Regulations; that the local board wrote a letter expressing its opinion to the board of appeal, contrary to the Regulations, in violation of the procedural rights of petitioner, that in such letter the board of appeal was advised that petitioner should not be classified in IV-D because his name did not appear on the certified official list of ministers of Jehovah's witnesses filed with State Headquarters and that the statement in the letter that petitioner devoted only three days weekly to the performance of his missionary duties was not supported by written evidence in the file; that the local board unlawfully withheld from the petitioner's file documentary evidence appearing in defendant's Exhibit A and had declined to re-

open and consider anew petitioner's classification and had unlawfully withheld the documentary evidence from consideration by the board of appeal in violation of the Selective Service Regulations and the due process clause of the Fifth Amendment to the United States Constitution. (55-59, 167-189)

The trial court erroneously excluded from evidence, over the objection of petitioner, testimony of petitioner's witness, Frank A. Pireaux, chairman of the board of appeal. (61) If permitted to testify Pireaux would have said that the board of appeal considered only the evidence reduced to writing in the petitioner's file, which showed that the Watchtower Bible and Tract Society was a recognized religious organization under the Act; that petitioner was a regular minister of that Society from 1936 to 1944; that there was no evidence to dispute petitioner's claim that he was devoting substantially his full time to the performance of his work as a missionary evangelist; that the board of appeal did not find that petitioner fictitiously claimed to be a minister of the Watchtower Bible and Tract Society; that the only reason the board of appeal did not classify petitioner as a minister of religion was because his name did not appear on the official certified list on file at State Headquarters of Selective Service; that the board of appeal considered the letter written by the local board to the effect that petitioner should not be classified as a minister because his name did not appear on such certified list; that they were persuaded by the false statement of the local board that petitioner devoted only three days weekly to his ministry; that the board of appeal did not consider the affidavits and documentary proof offered by the petitioner, appearing in Exhibit A, because they were not forwarded to the board of appeal by the local board; and that if the board of appeal had considered the documentary evidence appearing in Exhibit A, they would have reached a different conclusion and found that petitioner was exempt

from all training and service as a minister of religion. (61-66, 167-189)

The trial court erroneously excluded from evidence Defendant's Exhibit "A" which contained several documents proving the ministerial status and full-time evangelistic missionary work done by petitioner. Some of these documents were offered to the local board in 1942. The local board at that time illegally refused to receive them and consider them or to reopen the case, falsely stating to petitioner that the file was in the hands of the board of appeal. Additional documentary proof was prepared in 1944 added to these documents and mailed to the local board before Estep's file was forwarded to the board of appeal so the board could reopen the case, file the evidence in the Cover Sheet, and forward the same to the board of appeal. The local board illegally and unlawfully refused to place the evidence in the file and fraudulently withheld the same from the board of appeal, contrary to the Regulations and in violation of procedural rights of the petitioner guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. (10-11, 24, 50-52, 167-189) This evidence was objected to by the Government and the court sustained the objection with exception to petitioner. (24, 52)

The trial court erroneously excluded from evidence Defendant's Exhibit J, an anonymous note to the local board to which was attached a newspaper clipping concerning the sentence of Nick Falbo, the writer requesting the board to take similar action against Estep. This additional information was placed in the petitioner's Cover Sheet in December 1942, by the local board after the appeal was taken, and after refusing to receive additional evidence tendered by Estep. It was offered for the purpose of showing that petitioner had been denied his procedural rights by placing prejudicial information in his file which was not evidence as to his ministerial status. (15, 48, 218-219) The court sustained the objection of the Government with exception

to petitioner. (48)

The trial court erroneously excluded from evidence, with exception to petitioner, the testimony of petitioner's witness, Charles R. Hessler, a full-time district superintendent and minister of Jehovah's witnesses and the Watchtower Bible and Tract Society connected with the organization since 1917. Hessler would have testified that he had under his supervision as presiding minister in the district of Pittsburgh, the congregations located in Allegheny and Washington counties; that he became acquainted with petitioner, William Murray Estep, in 1936; that Estep enrolled as a student in the advanced course of ministry in the divinity school conducted by Jehovah's witnesses at Pittsburgh and later in Washington county, attending three nights weekly; that he was president of a religious corporation organized to operate a school to provide education for young "witnesses" excluded from public school for failing to salute the American flag, which school also provided a regular course of study for the purpose of training and preparing young men for the ministry; that Estep regularly attended this school, pursuing the regular course and the special ministry training course from 1936 to 1940 when he graduated after successfully completing the prescribed courses of study; that he personally authorized petitioner to preach as a part-time minister in 1936 while continuing his course of study in preparation for his full-time ministry; that since 1940 he had seen Estep grow from a part-time to a full-time minister; that Estep stands in the same relation to Jehovah's witnesses as do the orthodox clergy toward its denominations; that he knows that Estep is authorized to perform burial, baptismal and other ceremonies; that Estep has regularly served in the capacity of a full-time pioneer and evangelistic minister since October 1941. (67-71) This evidence was offered for the purpose of a *de novo* consideration of the court upon the issue of exemption of the petitioner from training and service under the Act, and to establish that the administrative agency

had no authority to order the petitioner to submit to induction into the armed forces and that petitioner had been deprived of his constitutional rights contrary to the Fifth Amendment to the United States Constitution. (71-72) This evidence was excluded with exception to petitioner. (72-73)

Similar offers of proof were made in connection with the testimony of petitioner's witnesses Stewart, McKnight, Singer and Ferree. (73) These offers of proof were made for the same purpose as the offer of proof in connection with the testimony of Charles R. Hessler. (73) These offers of proof were excluded for the same reasons. (74) Exceptions were allowed to the petitioner for the exclusions. (74)

The trial court erroneously excluded from evidence the testimony of the petitioner, William Murray Estep, as to his plans to become a minister at a very early age; the instruction he received at home from his parents in preparation for the ministry; his enrolling in the Watchtower Divinity School at an early age; his regular attendance at such school with his parents; that after becoming qualified to teach and preach in 1936 he began to preach part time from house to house; that while pursuing his part-time ministry he regularly attended the Gates Kingdom School which provided instruction in the regular public school subjects from the first to the twelfth grade and also a special course for the preparation of young men for the ministry; that he attended this Kingdom School from 1936 to May 1940; that shortly following his graduation he became assistant to the presiding minister of the Washington, Pennsylvania, congregation of Jehovah's witnesses and thereafter devoted a large part of his time to preaching as a missionary evangelist; that in October 1941 he undertook his full-time pioneer evangelistic missionary work and also continued to act as assistant to the presiding minister of the Washington congregation of Jehovah's witnesses, devoting an average of more than 150 hours monthly to actual

preaching in addition to time required for daily study and preparation for carrying on his ministerial duties; that thereafter in the performance of his full-time ministerial duties, he was transferred by the legal governing body of Jehovah's witnesses, the Watchtower Bible and Tract Society, to serve in ministerial capacities in New York City, Uniontown, Pennsylvania and Akron, Ohio; that his duties consisted of calling from house to house as did Christ Jesus and his apostles, publicly preaching upon the streets by distribution of *Watchtower* and *Consolation* magazines, by calling back on interested persons and answering Bible questions, by establishing and conducting studies in the Bible and Bible helps in the homes of the people and by regularly delivering Bible sermons to congregations of Jehovah's witneses at least once weekly. (78-97) This evidence was offered for the purpose of a *de novo* consideration of the court upon the issue of exemption of petitioner from training and service under the Act, and to establish that the administrative agency had no authority to order petitioner to submit to induction into the armed forces and that petitioner had been deprived of his constitutional rights contrary to the Fifth Amendment to the United States Constitution. (74, 97) This offer of proof was objected to by the Government. (78, 97) The court sustained the objection, excluded the evidence, with exception to petitioner. (97)

The trial court erroneously excluded from evidence Defendant's Exhibit C, petitioner's certificate of ordination with accompanying documentary evidence (12, 45, 192); Defendant's Exhibit D, a written request of petitioner for a personal appearance before the local board, together with documentary evidence (13, 46, 193); Defendant's Exhibit F, a transcript of the proceedings at the personal appearance on October 21, 1942 (13, 47, 200-211); and Defendant's Exhibit N, a letter from petitioner to the local board dated August 21, 1942 (21, 49, 224), all of which documentary evidence was duly filed with the local board and

made a part of the Cover Sheet and duly considered by the local board and board of appeal upon a determination of Estep's claim for exemption from training and service under the Act and Regulations. This evidence rejected by the court (45, 46, 47, 49) showed that petitioner was at all times a minister of religion; that there was no credible evidence or substantial evidence before the administrative agency which disputed Estep's evidence that he was a duly recognized minister of the Watchtower Bible and Tract Society and Jehovah's witnesses; that the action of the administrative agency was contrary to law, without support of substantial evidence, arbitrary and capricious, contrary to the Act and Regulations, in excess of authority and in violation of the due process clause of the Fifth Amendment to the United States Constitution. (192, 193, 200, 224)

At the close of the evidence petitioner moved for a dismissal of the indictment (113-115) and for a directed verdict (116-120) on the grounds that the undisputed evidence showed that the draft board order was void because the board acted in excess of its authority in that petitioner was a minister of religion exempt from all training and service and was not liable for training and service under the Act; that he had exhausted his administrative remedies and was in a position to challenge the action of the administrative agency and the orders on which the indictment was based; that the board had denied him his rights of procedural due process by rejecting the evidence and that the court had construed the Act and Regulations so as to require a registrant to submit to induction as a condition precedent to a judicial review, which denies the petitioner the right of a judicial trial contrary to the Constitution of the United States. (113-120) Each motion was denied with exception to petitioner. (120-121)

Petitioner duly tendered to the court requested charges to the jury. (123-145) The requested charges defined what constituted a regular or duly ordained minister of religion (123, 123-124, 124-135); stated the duties of draft boards in

considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. (135-136, 139-144) The court was requested to charge the jury that if they concluded and found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses (136-138), and there was no substantial evidence that he was not such a minister as claimed (138), that they could aquit the petitioner by their verdict saying he was not guilty. (136-138) The court was requested to charge the jury that if they found that the boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations and arbitrarily or capriciously, they could render a verdict of not guilty. (135-140) These requests were each refused separately and exception allowed to each refusal. (148-149)

The court instructed the jury that the classifications made by the draft boards were final and binding upon the court and jury and could not be questioned, that the only issue to be determined was whether or not the petitioner submitted to induction, that if the evidence showed that petitioner failed to submit to induction, it would be the duty of the jury to find the petitioner guilty. (147) The court charged the jury that they could not say whether or not the petitioner was a minister of religion, that the jury must find him to be a registrant liable for training and service, that at this trial was no place or time to review the correctness of the action of the draft boards. (147, 148) The court told the jury that the court and jury had no power to review the action of the draft boards but that such action must be accepted as conclusive. (147, 148) Petitioner objected and excepted to these portions of the court's charge on the grounds that he was thereby denied the right to urge in defense to the indictment that he was exempt from training and service as a minister of religion; that the

court instructed the jury to convict him; that the instruction of the court denied him his right to a judicial trial and a trial by jury, and abridged his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution. (149-154) Moreover, the court's charge was objected to on the grounds that the holding that petitioner must submit to induction as a condition precedent to challenging the legality of the action of the administrative agency converted the Act and Regulations into a Bill of Attainder contrary to the United States Constitution. (152)

Throughout the trial, from beginning to end, the court held that the actions of the draft boards were binding upon petitioner, the court and the jury, and that petitioner could not challenge the same on any ground, or that his failure to submit to induction was not a wilful violation of the Act.

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction. (253-276)

POINTS FOR JOINT ARGUMENT *

[See note below]

ONE

The undisputed evidence shows that Smith is not guilty of failing to report for induction as charged in the indictment.

A

Smith's nonappearance before the board at the time stated in the order to report for induction was excused as a matter of law by reason of his being at the time falsely imprisoned and under duress.

B

Smith's refusal to submit to induction after reporting at the induction station did not constitute refusal "to report for induction as ordered by the said Local Board", and excused his nonappearance at the local board at the time specified in the order.

TWO

The trial court committed reversible error in charging the jury that the false imprisonment of Smith had nothing to do with his failure to report for induction, and in refusing to submit defendant's requested instruction that presented the issue of his appearance and conduct at the induction station as constituting reporting for induction.

* A disintegrated summary of the argument, showing references to pages of this brief where the respective parts of the argument appear, is part of the index at the beginning of this brief. It immediately precedes the table of cases cited.

THREE

A sensible construction of the Act and reasonable application of the Constitution require that Smith and Estep be allowed to challenge the validity of the administrative action supporting the judgments of conviction in defense to the indictments.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the armed forces and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to submit to induction and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing Smith and Estep their defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, Smith and Estep will be denied their right to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution.*

II. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, the Act will be transformed into a bill of pains and penalties contrary to Article I, Section 9, Clause 3 of the Constitution.*

FOUR

A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of their jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

FIVE

It was reversible error for each trial court to refuse the jury the right to inquire whether or not the action of the administrative agency in denying each petitioner his claim for exemption from training and service was in violation of the Act, the Regulations and the Constitution.

SIX

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely Smith's right to have the jury pass upon the issue of the validity of his defense.

SEVEN

Estep's procedural rights to due process of law were violated by his local board withholding evidence from the board of appeal, preventing it from properly determining his rights under the Act and Regulations, contrary to the Fifth Amendment to the United States Constitution.

JOINT ARGUMENT

ONE

The undisputed evidence shows that Smith is not guilty of failing to report for induction as charged in the indictment.

A

Smith's nonappearance before the board at the time stated in the order to report for induction was excused as a matter of law by reason of his being at the time falsely imprisoned and under duress.

Petitioner went to trial under the indictment on the theory that he was charged with failure to appear at the local board on September 30, 1943, at 8:30 a. m. (2-3) The Government's proof tended to show that he failed to appear at 8:30 a. m. on September 30 as ordered by the local board. (6-7) At no time did the Government offer any evidence that the petitioner failed to submit to induction at the induction station, as ground for the charge that he failed to comply with the order and thus became guilty to report for induction. (6-7, 44-45) The Government's testimony was corroborated by the documentary evidence, being the order to report for induction, that commanded petitioner to appear at his local board at 8:30 a. m. on September 30, 1943. (43) The theory upon which the case was submitted to the jury by the court in its charge was that the petitioner failed to appear at the local board. (28, 31, 32, 35, 40-41)

That the defendant was tried and convicted for his failure to appear at the local board, rather than for his refusal to comply with the orders of the military authorities, is proved by the failure of the court to mention this element of the case to the jury, and by the refusal of the court to submit the requested instruction on that phase of the case. (37)

The undisputed evidence showed that at the time petitioner was commanded to appear at the local board he was kidnaped, under duress, and was being forcibly transported to the induction center instead of to the local board. (11-12, 21, 51)

The case was not submitted to the jury on the theory that petitioner had the right to comply with the order after arriving at the induction center and thereafter declined to obey the order to submit to induction.

Although the defendant attempted to have the court hold that his failure to appear at the board was made immaterial by his subsequent appearance at the induction station (27; 49), the theory that petitioner's refusal to submit to induction at the induction station constituted failure to report for induction was not injected into the case until the Government filed its brief and argued the cause in the circuit court of appeals.

The Government changed its theory and position as to the issue of petitioner's guilt *for the first time* after the case reached the circuit court of appeals. It was not until after the Government became uneasy and fearful of the petitioner's claim that he was falsely imprisoned that it injected into the case, for the first time, its proposition that even though petitioner may not have been guilty of failing to report to the draft board at the time stated in the order he was nevertheless guilty of failure to report for induction because the evidence showed that he appeared at the induction station not for the purpose of induction and therefore did not report for induction. *Petitioner did not have an opportunity to litigate this question in the district court.*

Petitioner should not have been required to litigate this question for the first time in the circuit court of appeals.

If the circuit court of appeals believed that this was the issue to be determined, it should have remanded the case to the district court so as to enable petitioner to have his day in court and an opportunity to fight the Government before the jury on that question.

It was highly improper for the circuit court of appeals to champion this new theory of the Government and to seize upon it as the basis for finding the defendant guilty of violating the Act when even the jury in the district court had never had opportunity to pass upon the question. It cannot be argued that petitioner's contentions made in the trial court relative to his appearance at the induction station making immaterial his failure to appear at the local board at the time specified in the order justified the new contention of the Government. This was an alternative point advanced by the petitioner in the trial court. It was properly and timely urged upon the trial court, but the Government did not see fit to urge its novel position in the trial court; or else the Government was sleeping on the law in the trial court. Surely the petitioner should not be penalized and convicted upon a new theory *raised for the first time* in the circuit court of appeals because the Government was not sufficiently alert to advance this theory in the district court in a timely manner.

It is especially true that a defendant in a criminal case should not be convicted on a new theory raised for the first time in the circuit court of appeals, because the federal Constitution guarantees him the rights of trial by jury upon every issue affecting his guilt.

Of course the Government will argue that the facts were undisputed and only questions of law were presented. But even so, in a *criminal case* it is impossible for the court to withdraw the issue of guilt from the jury and instruct the jury to find the defendant guilty. *United States* v. *Stevenson*, 215 U. S. 190, 199; *Patton* v. *United States*, 281 U. S. 276; *Blair* v. *United States*, 241 F. 217; cert. denied 244 U. S. 655; *Cain* v. *United States*, 19 F. 2d 472.

A fortiori, it is impossible for the circuit court of appeals to convict the defendant-petitioner on a new theory advanced for the first time in the circuit court of appeals by the Government, even though the evidence is undisputed. Indeed, the trial judge found that the evidence was undis-

puted, yet he did not withdraw the issue of guilt from the jury. (38) He told the jury: "The particular issue as to the facts, it seems to the court, arises out of the interpretation that is to be placed upon facts, most of which is conceded." It was for the jury to interpret the facts and determine whether or not petitioner's refusal to submit to induction constituted, under the law, a failure to comply with the order to report for induction.

In the trial court the petitioner did not receive an adjudication by the district judge or a consideration by the jury on the issue of whether or not his failure to submit to induction constituted failure to report for induction.

The first time he received a "trial" on that issue and theory in this case was when the cause reached the circuit court of appeals.

It is axiomatic that all issues in a criminal case that are made the basis of guilt must first be submitted to the jury by the district court. Such issues cannot be reviewed *de novo*, and for the first time upon appeal, by the circuit court of appeals. *Robinson* v. *Belt*, 18 U. S. 41, 50. The facts on this issue were determined and found for the first time and *de novo* in the circuit court of appeals. Due order of appellate procedure forbids the retrial of facts and any new issues injected into the case in the appellate court. The only mode known to the law to re-examine new issues on facts in a criminal case where the defendant is entitled to the right of trial by jury is in the trial court. *Chicago B. & Q. Ry.* v. *Chicago*, 166 U. S. 226, 242-246.

The court below said that a forcible seizure which made it impossible to comply with the board's order would doubtless be a defense. (62-63) The circuit court of appeals said that the seizure made it possible for the petitioner to comply with the order, because he could have submitted to induction when ordered to do so by the armed forces at the induction station. This holding of the appellate court is based on the theory that the defendant was being tried for his refusal to report for induction by refusing to submit

to induction. When the record is examined it clearly appears that the case was tried on the theory that the defendant failed to appear at the local board. This being true, it was impossible for petitioner to comply with the order as he was commanded to appear. On the theory that the petitioner was convicted in the trial court of failing to appear at his local board, the decision of the courts below is in direct conflict with *United States* v. *Hoffman*, 137 F. 2d 421. Cf. *United States* v. *Grieme* (CCA-3) 128 F. 2d 811, 815.

Petitioner was tried and convicted in the district court on the ground that he intended not to report for induction but to report to the United States Commissioner on the morning of September 30, 1943, at 8:30 o'clock, thereby rendering immaterial his false imprisonment at the time that he was to appear at the local board as required by the order, especially in view of the fact that he did not comply with the order after the restraint was terminated. (32, 41)

Can a registrant be convicted for failure to report because of his intention not to report and without proof of an overt act?

The mere asking of the question resounds an emphatic NO.

"Not every failure to perform a duty imposed by the statute is made criminal." *United States* v. *Trypuc* (CCA-2) 136 F. 2d 900, 901. See *Mackey* v. *United States* (CCA-6) 290 F. 18, 21. Cf. *Hackfeld & Co.* v. *United States*, 197 U. S. 442, 448.

The situation in which the petitioner found himself is analogous to that of a man ordered by the court to provide regular support to his spouse from whom he is separated. If he were proceeded against for contempt because of failure to make monthly payments, he could no doubt show that by some fortuitous circumstance beyond his control it was humanly impossible to comply with the court's order, even though he may have intended not to pay, even if able to do so. There must be the commission of an overt act or the freedom to commit an overt act at the time of an alleged

offense such as the petitioner here was charged with and convicted of. If by reason of duress or false imprisonment a person is incapacitated from committing the crime, it is highly improper to convict him merely because of his previous declarations or his intent.

It has been held that a registrant's good intentions and belief that he was not liable under the Act do not constitute valid defenses. *United States* v. *Madole* (CCA-2) 145 F. 2d 466, 467; *Baxley* v. *United States* (CCA-4) 134 F. 2d 937. If *good intention* is not a defense, then by force of the same reasoning *bad intention* does not constitute a true and sufficient basis for guilt under the Act where there is no overt act committed or where it was humanly impossible to perform a duty regardless of the intention of the person charged.

Accordingly, the court below erred in holding that the trial court was not required to grant the petitioner's motion for a directed verdict, because the undisputed evidence showed as a matter of law that he was not guilty of failing to report at the local board on September 30, 1943, at 8:30 a. m., by reason of his being falsely imprisoned and under duress at the time.

B

Smith's refusal to submit to induction after reporting at the induction station did not constitute refusal "to report for induction as ordered by the said Local Board", and excused his nonappearance at the local board at the time specified in the order.

Section 633.2 of the Selective Service Regulations provides for the issuance of the order to report for induction.

Section 633.21 of the Regulations provides: "It shall be the duty of the registrant to report for induction at the time and place fixed in such order. . . . Regardless of the time when or the circumstances under which the registrant fails to report for induction when it is his duty to do so,

it shall thereafter be his continuous duty from day to day to report for induction to his local board."

That same regulation (Sec. 633.21) further provides that upon "reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board."

In *Billings* v. *Truesdell* (321 U. S. 542) this court discussed the various Selective Service Regulations pertaining to the process of selection and induction. This court said:

"The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction." (p. 553)

"These regulations thus suggest that induction follows acceptance and is a separate process." (p. 554)

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station." (p. 555)

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board." (p. 556)

Although the order "to report for induction includes a command to submit to induction" (*Billings* v. *Truesdell*, 321 U. S. 542, 557) upon "reporting for induction" (Regulations, Sec. 633.21), it does not mean that refusal to *submit*

to induction constitutes failure to report for induction.

A reasonable interpretation of the term "report for induction" is "to make one's presence . . . known to the proper authority by presenting oneself; as, . . . to report at Headquarters." (*Webster's New International Dictionary*, 1944 edition) All statutes should be given a reasonable construction. An interpretation which leads to absurd consequences must be avoided whenever a sensible interpretation can be given to the statute. *Hawaii* v. *Mankichi*, 190 U. S. 197, 212. Under this rule requiring a sensible construction, it would seem that "reporting" for induction means "appearing" before the designated authority.

There is a clear distinction between reporting for induction and submitting to induction: Regulations, Sec. 633.21 (b). Failure to *submit* to induction is not included in failure to *report* for induction. The court below relied upon *United States* v. *Collura* (CCA-2) 139 F. 2d 345, saying that the decision was directly in point. The *Collura* case did not say that the refusal to submit to induction constituted failure to report for induction, or that refusal to submit to induction was included in the offense of failure to report for induction. The *Collura* case is distinguishable because there Collura did not complete the "connected series of steps into the national service which begins with registration" and which "does not end until the registrant is accepted by the army, navy, or civilian public service camp." (*Falbo* v. *United States*, 320 U. S. 549, 553) Collura appeared at the induction station and attempted to bargain with the medical authority. He did not undergo the induction process. He was not examined at the induction station. He did nothing but report and refuse to go further. He did not have a chance to refuse to submit to induction.

Here petitioner, after appearing at the induction station, voluntarily entered into the process of selection at the induction station and obeyed all orders of representatives of the armed forces down to the point where he was requested to submit to induction. Since obedience to the

orders of the representatives of the armed forces at the induction station constituted reporting for induction, according to the opinion of the court below, petitioner had reported for induction while he was complying with the orders down to the point of his refusal to submit to induction. Both the local board and the representatives of the armed forces at the time considered the petitioner as having reported for induction. The local board's clerk was telephoned by the representative of the armed forces at the induction station. That representative informed the board's clerk of petitioner's appearance and presence at the induction station. The clerk did not protest. The military authorities did not treat petitioner as having failed to report for induction. Indeed, representatives of the armed forces assumed military jurisdiction over petitioner in spite of his refusal at that time to submit to induction by undergoing the prescribed ceremony.

Petitioner's appearance at the induction station, submitting to the selective process, complying with all orders of representatives of the armed forces down to the point of refusing to submit to induction, distinguishes this case from the decision in *United States* v. *Collura* (CCA-2) 139 F. 2d 345, and the decision in the case of *United States* v. *Longo* (CCA-3) 140 F. 2d 848. When one appears at the induction station and refuses to take any steps, but merely presents himself there for the sole purpose of informing the authorities that he will not submit to any of their orders and refuses to enter upon any of the process, it cannot be said that he has reported for induction.

But one who, as Smith, or as Billings, reports at the induction station and undergoes the process to the point that he has exhausted his administrative remedies and then refuses to submit to induction, indeed has *reported* for induction. It cannot be reasonably said that he has not *reported* for induction. In other words, if one reports for the purpose of exhausting his administrative remedies he

has reported at the induction station "as ordered by the said Local Board". (3)

The construction here contended for (that refusal to submit to induction does not constitute failure to report for induction) has been recognized by the Government in several prosecutions:

Billings, whose conduct at the induction station was identical with that of Smith, after this court discharged Billings on the petition for writ of habeas corpus, was indicted because he did "refuse to report to said Local Board for induction *and to submit to induction* into the land or naval forces of the United States at the time and place so designated in said order."

In *United States* v. *Rinko*, the defendant was indicted for failure to report for induction, for failure to obey the orders of representatives of the armed forces while at the induction station and for failure to submit to induction. (*Rinko* v. *United States*, No. 1071 Oct. T. 1944, cert. denied 65 S. Ct. 1086, Record pp. 2-5) On facts similar to those in this case Rinko was found not guilty of failing to report, but was found guilty of failing to obey the orders of representatives of the armed forces and of failure to submit to induction. *Ibid.* 157.

In *United States* v. *Estep* (CCA-3) 150 F. 2d 768 (*Estep* v. *United States*, No. 292 Oct. T. 1945, certiorari granted Oct. 8, 1945, Record p. 1), defendant was indicted for failure to submit to induction. On facts analogous to the facts in this case Estep was convicted of failure to submit to induction. *Ibid.* 148, 156, 160.

The court below relies upon the language of this court in *Billings* v. *Truesdell*, 321 U. S. 542, 557, where it is said: "He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura*, *supra*. The order of the local board to report for induction includes the command to submit to induction."

The mere fact that one who refuses to submit to induc-

tion violates the Act as clearly as one who refuses to report does not mean that he can be convicted for failure to report for induction when facts show that he was guilty of failure to submit to induction. There are many different acts of Congress that have penal provisions which may be violated in any one of several different ways, but a person indicted for violating the Act in one way specifically described in the indictment cannot be convicted for violating the Act upon proof showing that he violated it in another way.

One indicted for burglary could not be convicted of the offense of burglary if the facts showed that he was guilty only of theft. The offense of failure to submit to induction is equally as distinct from the offense of failure to report for induction as the offense of theft differs from that of burglary. It is fundamental that a defendant in a criminal case cannot be convicted of an offense different from that for which he is indicted.

The court below said that "presence at the induction center, rather than at the board's office, would doubtless be sufficient compliance on the part of one who was attempting to" submit to induction. (59) But the court below held that if one reported to exhaust his remedies and intended to refuse to submit to induction it would not be reporting for induction within the meaning of the Act. (59) In other words, the court holds that if a registrant had good intentions upon reporting and complied with all orders by submitting to induction then he can be said to have reported for induction. On the contrary, the court said that if the one had bad intentions or intended to refuse to submit to induction after reporting to exhaust his administrative remedies, he did not report for induction. Such construction placed upon the Act by the court below, that bad intention transformed the offense of failure to submit to induction into failure to report for induction, is unreasonable. Such strained construction in interpreting the Act makes a dragnet out of an indictment charging the registrant with failure

to report for induction. It permits such a registrant to be put to trial under circumstances making it impossible to know what proof he will be required to meet, or what act will be relied upon by the Government as constituting the basis for guilt.

The injustice of the construction placed upon the Act by the court below is proved by the mistreatment of the petitioner in this case. In the trial court the Government contended that it was petitioner's failure to report at the local board that made him guilty. Indeed, in the trial court, under the indictment, petitioner was found guilty of violating the Act by failing to report to the local board at the time specified in the order. He was not found by the jury guilty of violating the Act by his failure to submit to induction. But under the construction placed upon the Act and the indictment by the court below he was found guilty *for the first time* in the circuit court of appeals, under the indictment, of violating the Act by refusal to submit to induction.

Thus petitioner was convicted in violation of the orderly due process of law in the trial of criminal cases in the federal courts.

TWO

The trial court committed reversible error in charging the jury that the false imprisonment of Smith had nothing to do with his failure to report for induction, and in refusing to submit defendant's requested instruction that presented the issue of his appearance and conduct at the induction station as constituting reporting for induction.

By stating a hypothetical case to the jury in its charge to the jury the trial court informed the jury that petitioner's

false imprisonment had nothing to do with his failure to appear at the local board at the time specified in the order. (32) Exception was duly taken to this charge. (40-41) In petitioner's requested instruction No. 10 the court was asked to charge the jury that if they found petitioner appeared at the induction station, underwent the physical examination and other prescribed procedure, obeyed all orders and participated in the induction ceremony to the point of refusing to submit to induction, they could find that he did not fail to report for induction as charged in the indictment and acquit the defendant. (37) Exception was taken to the refusal of the court to grant that requested charge. (40)

Petitioner was entitled to have the jury consider the circumstances of his being under duress and falsely imprisoned at the time he was required to report at the local board in determining whether or not he was guilty of failing to report at the local board as alleged in the indictment. The charge of the court in stating the hypothetical case, by informing the jury that if petitioner had no intention of going to the local board at the time specified in the order, his false imprisonment and the duress exercised against him would have nothing to do with his failure to comply with the order, was erroneous, prejudicial to the petitioner and is ground for reversing the judgment of conviction and remanding the case to the trial court for retrial.

Moreover, petitioner was entitled to have the jury give proper consideration to his conduct at the induction station in determining whether or not he was guilty of failure to report for induction. These elements were properly presented to the court in the requested instruction No. 10, which was refused by the court. This also was reversible error and requires that the judgment be reversed and the cause remanded to the trial court for a new trial.

THREE

A sensible construction of the Act and reasonable application of the Constitution require that Smith and Estep be allowed to challenge the validity of the administrative action supporting the judgments of conviction in defense to the indictments.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the armed forces and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to submit to induction and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

Section 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. Sec. 311) provides: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, . . . who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."

The Burke-Wadsworth Senate bill provided for the civil

and military courts to have concurrent jurisdiction over violators of the Act. (86 Cong. Record, part 9, page 10709) Before the Act was passed Senator Bone introduced an amendment. He said:

> "My amendment would substitute the United States District Court as the body to try such a young man [who violates an order to report for induction] instead of a naval or military court martial. . . . " (86 Cong. Record, p. 10985)

That provision was accepted by a conference of both houses.

The conference report reads, *inter alia*:

> "The Senate Bill provided that persons subject to the Bill who fail to report for duty as ordered should be tried exclusively in the District Courts of the United States and not by military or naval court-martial, unless such persons had actually been inducted for the training and service prescribed in the Bill . . ."

Major Lewis B. Hershey testified before the Committee on Military Affairs, House of Representatives, that the military authorities should not be the policemen to enforce the Act. After he became the Director of Selective Service he made the first report of the Director to the President. (*Selective Service in Peacetime*, Government Printing Office, 1942) In that report he stated that the prosecutions had not been vested with the military authorities, but that all alleged delinquents under the Act were prosecuted by civil authorities in the district courts through the Department of Justice. He declared that the authorities of the armed forces had no jurisdiction over a delinquent. He commended this method of enforcement of the Selective Training and Service Act, stating that the nation had learned its lesson from the Civil War when draft riots resulted from automatic conscription and the exercise of jurisdiction to enforce the law by the armed forces. (*Ibid.*, pp. 293-297; see,

also, *Selective Service in Wartime*, Second Report of the Director of Selective Service 1941-1942, Government Printing Office, 1943, pp. 311-312.)

A reasonable interpretation of the statute by this court is due, indulging all reasonable doubts concerning the meaning of the Act in favor of the rights of one indicted thereunder. (*Harrison* v. *Vose*, 50 U. S. 372, 378) It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences, or flagrant injustice. It will be presumed that Congress intended to avoid results of such character. (*United States* v. *Kirby*, 7 Wall. 482, 486-487; *United States* v. *American Trucking Ass'n*, 310 U. S. 534) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408) The argument of the Government, that a defendant charged with violation of the Act by failure to comply with the orders of the draft boards or the armed forces cannot challenge those orders in defense to an indictment and that the only remedy a person has is to apply for a writ of habeas corpus, requires the court to place an unreasonable construction upon the Act. Additionally, it raises "a succession of constitutional doubts as to such interpretation." (*Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407, 422)

The Government says that the complete absence of any provision for such defense forces the conclusion that Congress did not intend to allow it. Silence of the Act about the defenses available does not preclude a challenge of the validity of an order on which an indictment is based. Murder is prohibited, yet the statute defining it is silent about the defenses of accident and self defense. (35 Stat. 1143, 18 U. S. C. Sec. 452) Crime of rape is also prohibited, although the statute defining and prohibiting it says nothing about the defense of consent. (35 Stat. 1143, 18 U. S. C. Sec. 457)

The statute prohibiting larceny defines it, yet says nothing about the defense of ownership. (35 Stat. 1144, 18 U. S. C. Sec. 466) Silence of these statutes does not prohibit the one indicted thereunder from making the defenses above mentioned. It is the duty of the court to interpret criminal statutes so as to permit the defendant to make any reasonable defense and to avoid penalties and oppression. In the case at bar the court must indulge in a fiction to say that Congress specifically intended to deny the defense of no duty under the Act. Had Congress decided to prohibit persons with no duty under the Act from making defenses to indictments under the Act charging them with failure to perform a duty, it would not have done so "by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process." *Western Union Tel. Co.* v. *Lenroot,* 323 U. S. 490.

Criminal sanctions of Section 11 of the Act are limited to one who refuses "to perform *any duty* required of him under or in execution of this Act". Surely if Congress exempted a person from *duty* he could show such exemption as one of his defenses under the Act when prosecuted under Section 11. Furthermore, if the administrative action or determination upon which the indictment under Section 11 of the Act is based is illegal, then reason and justice would dictate that such invalidity can and may be shown in defense to the indictment.

Wholly unreasonable is the assumption that Congress, through Section 11 of the Act, intended to confer jurisdiction upon federal district courts to try offenders, and then sap the courts of their judicial power by mere silence. The mere fact that the Act is a war measure, designed to defend the nation in time of peril, does not justify distortion of the Act so as to deny a necessary and reasonable defense.

Even in England, where the legislative and administrative bodies acting pursuant to acts of Parliament are wholly unrestrained by a written constitution, the courts have refused to construe a war measure and regulations thereunder so as to deny one the right of access to the courts to protect himself from oppressive administrative action taken under the measure. *Chester* v. *Bateson*, 1920, 1 K. B. 829. In that case Justice Darling said: "I allow that in stress of war we may rightly be obliged, as we should be ready, to forego much of our liberty, but I hold this elemental right of the subjects of the British crown cannot be thus easily taken from them." (p. 835)

Justice Avory, in the same case, declared: "In my opinion there is not to be found in the statute anything to authorize or justify a regulation having that result; and nothing less than express words in the statute, taking away the right of the King's subjects of access to the Courts of Justice, would authorize or justify it." (p. 836)

In the same case, Justice Sankey said: "I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act." (p. 838)

Justice Scrutton, on considering the same statute (In re *Boaler*, 1915, 1 K. B. 21, 36) said: "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. . . . But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension."

Under the British Military Service Act of 1916 containing provisions similar to those of the Selective Training and Service Act of 1940, it was held that a regular minister who refused to report for induction as ordered by the admin-

istrative board under the Act was entitled to challenge the legality of his classification in defense to summary criminal proceedings brought against him to punish him for failure to be conscripted under the Act as ordered by the board. (*Offord* v. *Hiscock*, 86 L. J. K. B. 941; *Hawkes* v. *Moxey*, 86 L. J. K. B. 1530. Cf. *Wayne* v. *Thompson*, L. R. 15, Q. B. 342, 1885.)

Are the rights of the subjects of the British King, to have free access to the courts to protect their liberties, greater than the rights of citizens of the United States?

Does the fact that here is involved the emergency of 1939-1945 instead of the emergency of 1914-1918 alter the situation so as to minimize those rights?

The failure of Congress to provide for judicial review of the validity of administrative orders in other acts establishing administrative agencies has not precluded judicial review. In absence of specific provision for judicial review of the illegality of administrative action the courts have allowed review under general practice and law. These non-statutory provisions for judicial review have been available for the review of major administrative activities of the Government for which no remedy is provided in the statute. (*United States* v. *O'Donnell*, 303 U. S. 501, 524; *United States* v. *Griffin*, 303 U. S. 226, 238; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 343; *Ng Fung Ho.* v. *White*, 259 U. S. 276; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. See "Administrative Procedure in Government Agencies", 77th Cong., 1st Sess., Senate Document No. 8, Government Printing Office, Washington, 1941, pages 81, 92-93.)

Even where the statutory remedy expressly provided is not adequate to protect the right, or does not include the particular situation involved, the courts have allowed judicial review in addition to the statutory methods employed. *Shields* v. *Utah-Idaho Central Ry.*, 305 U. S. 177; *Utah Fuel Co.* v. *Bituminous Coal Comm'n*, 306 U. S. 56.

That the Selective Training and Service Act of 1940 is

a war measure, effective during the emergency, does not affect the rule of reasonable construction, or the rule of construction so as to avoid unconstitutional results. The Constitution of the United States provides for protection of the right of defendants in criminal cases to make their defense at all times. Those rights cannot be taken away in prosecutions under war measures merely because it is expeditious and in the interest of public policy to do so. The constitutional restraint directing a construction of the act so as to allow petitioner a defense to the indictment "is a law for rulers and people, equal in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances". (*Ex parte Milligan*, 2 Wall. 2, 120) It would be treason to the Constitution for the judiciary to deny protection of the rights of a citizen prosecuted under a war measure because of public policy. *Cohens* v. *Virgina*, 6 Wheat. 264, 404.

Recently this court has said that the members of the court "fully recognize, as did the Court in *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 426, that 'even the war power does not remove constitutional limitations safeguarding essential liberties.'" *Bowles* v. *Willingham*, 321 U. S. 503, 521. Cf. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155.

Denial of the defense to a registrant who claims exemption because he defied the order of the draft boards has no reasonable relation whatever to the raising of an army or to the defense of the country.

Denial of the defense has not discouraged delinquency under the Act. (See Third Report of the Director of Selective Service, *Selective Service as the Tide of War Turns*, Government Printing Office, Washington, 1945, p. 214.)

Denial to an exempt registrant of his defense under the Act to the indictment merely speeds the registrant into prison, making him become an adjunct of the federal penal community rather than of the nation's armed forces—the prison rather than the army being the recipient of the

registrant's presence. The national fighting force does not profit or benefit by denial of judicial process. The defense of the country does not gain anything by denying the right of due process of law to a registrant charged with violating a draft board order.

No clear and present danger to the raising of an army and navy results from allowing a defendant to show that he is not subject to any training and service under the Act because of the exemption provided by Congress.

Indeed, if exempt persons were allowed the right to protect themselves in the courts from arbitrary acts of draft boards that refuse to follow the law, greater respect for the Act would be accorded by the people who believe that the Act was passed for the purpose of preserving the instrumentalities of democracy rather than for the purpose of destroying the right of due process of law on the home front. The Government would have no difficulty whatever in convicting real draft evaders. If exempt persons were allowed their right to make their defense, honest judges and intelligent juries would have no difficulty in distinguishing an exempt person under the Act from a draft evader. The mere fact that exempt persons would have the right to make a defense to the indictment would not stimulate an increase in the number of draft evaders and delinquents. Criminally minded persons, intent upon defying the law, would not change their traits purely because exempt persons were denied their right to show their exemption in defense to an indictment based on an illegal draft-board order. Also honest ministers exempt from duty would not submit to an illegal order of a board merely because the courts have cut out reasonable defenses. Better it is for the guilty to escape, by reason of adherence to due process of law, than that one innocent person should be convicted on account of denial of due process of law, has ever been the policy in common law countries. For the same reason it should be held that one exempt under the Act should not be denied the right to show that he had no duty under the Act,

because some nonexempt person might fictitiously claim that he was exempt in defense to an indictment.

Considerations of public policy do not allow the denial of due process of law. This is specially true where no clear and present danger results to the raising of an army or navy through the granting of due process of law. The Government's argument that conscription of manpower for the armed forces under the Act would be impaired and possibly frustrated by allowance of due process of law to exempt persons under the Act is chimerical and figmentary. Such consequences cannot reasonably be conceived or foreseen when the clear-and-present-danger test is applied. Vague and speculative contingencies should not be seized upon to deny the constitutional right of one to be heard in defense to the indictment. The rule requiring establishment of clear and present danger before denial of the right of freedom of speech, of press and of worship can be sustained ought properly to be applied to the denial of the right to be heard and to a judicial trial. The mere possibility that a substantial evil will result cannot alone justify a restriction of the defenses ordinarily allowed in criminal cases. The danger must be substantial, serious, clear and present. Inconvenience to the Selective Service System of an exempt person claiming his right to due process of law, contrary to the expression of administrative preferences and beliefs, cannot transform the allowance of due process of law in a criminal case into a clear and present danger to conscription of manpower under the Act. *Schenck* v. *United States*, 249 U. S. 47, 52; *Bridges* v. *California*, 314 U. S. 252; *Schneider* v. *State*, 308 U. S. 147, 161.

Preserving due process of law in the trial of cases brought under Section 11 of the Act, so as to permit an exempt person to challenge validity of the draft-board orders, has about as little effect upon and presents about as little danger to the raising of the armed forces as allowance of due process and the right of a defendant in a murder case to show that he shot in self-defense would

have on the funeral proceedings of the deceased.

This portion of the argument can be well summed up by a quotation from Mr. Justice Murphy in *Falbo* v. *United States,* 320 U. S. 549:

> "Finally, the effective prosecution of the war in no way demands that petitioner be denied a full hearing in this case. We are concerned with a speedy and effective mobilization of armed forces. But that mobilization is neither impeded nor augmented by the availability of judicial review of local board orders in criminal proceedings. In the rare case where the accused person can prove the arbitrary and illegal nature of the administrative action, the induction order should never have been issued and the armed forces are deprived of no one who should have been inducted. And where the defendant is unable to prove such a defense or where, pursuant to this Court's opinion, he is forbidden even to assert this defense, the prison rather than the Army or Navy is the recipient of his presence. Thus the military strength of this nation gains naught by the denial of judicial review in this instance. . . .
>
> "That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system. Especially is this so where neither public necessity nor rule of law or statute leads inexorably to such a harsh result. The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case."

Determinations of only a very few administrative tribunals have depended upon resort to the courts for enforce-

ment. In such instances where boards and commissions are required to seek the aid of the courts in enforcing their orders it has been held that the court called upon to enforce the order has the power to pass on the validity thereof and the administrative proceedings upon which the same is based. *Village of Carthage* v. *Colligan*, 216 N. Y. 217; *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320; *Wadley So. Ry.* v. *Georgia*, 137 Ga. 497, reversed 235 U. S. 651.

This question was considered by this court tangentially in *California* v. *Latimer*, 305 U. S. 255, 261. There the court denied the injunction prayed for to enjoin enforcement of the Railroad Retirement Act on the ground that any state employee proceeded against under the criminal sanctions clause of Section 10 (b) 4 could defend to the indictment "on the ground that the State Belt Railroad is not subject to the Railroad Retirement Acts."

In *Hagar* v. *Reclamation District*, 11 U. S. 701, this court said: "The assessment under consideration could, by the law of California, be enforced only by legal proceedings and in them any defense going either to its validity or amount could be pleaded."

Decisions of the lower courts have blindly assumed, without discussing these various considerations and the right to due process of law in a criminal trial, that Congress intended to deny the right to challenge the invalidity of the draft-board order in the federal courts unless and until the registrant had satisfied the order by fully complying therewith through submission to induction into the armed forces. *Smith* v. *United States* (CCA-4), 148 F. 2d 288; *Koch* v. *United States* (CCA-4) 150 F. 2d 762, decided July 11, 1945; *Rinko* v. *United States* (CCA-7) 147 F. 2d 1; *Estep* v. *United States* (CCA-3) 150 F. 2d 768, certiorari granted Oct. 8, 1945. These decisions are an illogical and an unnecessary extension of the doctrine of *Falbo* v. *United States*, 320 U. S. 549; *United States* v. *Grieme* (CCA-3) 128 F. 2d 811; *United States* v. *Kauten*, 133 F. 2d 703, and scores of other decisions too numerous to mention, all of which involve

instances where the registrant failed to exhaust his administrative remedies. The reason that judicial review was not permissible and denied in all those administrative-law cases is that the registrant had failed to exhaust completely his administrative remedies under the Act. *Myers* v. *Bethlehem Shipbuilding Corp'n,* 303 U. S. 41. All of these many decisions holding that the orders of the draft boards cannot be challenged by registrants who refuse to report for induction are not in point, and they are not precedent dispositive of questions presented in the circumstances under review here, because here the registrant completed the administrative process. See dissenting opinion of Biggs, C. J., in *United States* v. *Estep* (CCA-3) 150 F. 2d 768, decided July 6, 1945, No. 292 October Term 1945, *Estep* v. *United States,* certiorari granted Oct. 8, 1945, Transcript of the Record, pp. 299-306.

There is no Congressional material from which it may be determined precisely what Congress intended to permit about denying challenge to orders of draft boards in defense to indictments based thereon under the Act. The construction placed upon the Act by the courts was reiterated in the Report of the Committee on Military Affairs, 79th Congress, 1st Session, which is a report on the bill for mobilizing of civilian manpower, H. R. 1752. In that report it is said: "In order to obtain judicial determination of such issues, such registrants must first submit to induction and raise the issue by habeas corpus. See *Ex parte Stanziale* (CCA-3, 1943) 138 F. 2d 312, cert. den. 320 U. S. 797." This report does not express the Congressional intent in the passage of the Act in 1940. Indeed, this court found that there was no record of legislative intention on the subject. (*Falbo* v. *United States,* 320 U. S. 549, 554) Whatever may be said as to the intention of the Committee on Military Affairs, there seems to be real doubt as to whether Congress ever intended that one should be denied the right to challenge the legality of an administrative order supporting an indictment brought to enforce the order. The Select Committee to

Investigate Executive Agencies, in its Second Intermediate Report (H. R. 862, 78th Congress, 1st Session, page 5), condemned the conclusion reached by this court in *Yakus* v. *United States*, 321 U. S. 414. In that report the Committee said: "That a citizen may be indicted, tried, and convicted for violation of an illegal regulation or order made by an executive agency, without having the right to plead such invalidity in the court where he is indicted and tried is, indeed, a novelty in our jurisprudence, and if sustained by the courts it should be immediately corrected by amending the act."

The decision of this court in *Falbo* v. *United States*, 320 U. S. 549, does not support the argument of the Government that this court held a registrant must submit to induction as a condition precedent to obtaining judicial review of the illegality of the draft-board order. All that the *Falbo* decision held was that no judicial intervention to determine the illegality of the action of the draft board could be made which would disrupt the selective process—the process leading up to the selection and acceptance of registrants by the armed forces. The *Falbo* decision was confined to the narrow question of "whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." Mr. Justice Black said that Congress was not required to provide judicial review "before final acceptance of an individual for national service. . . . The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. . . . Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so." (pp. 554-555)

It seems plain that the decision in *Falbo* v. *United States* (320 U. S. 549) was a procedural decision on administrative law, announcing the fundamental proposition that judicial

intervention of administrative action cannot be made until all administrative remedies have been completed. (*Myers* v. *Bethlehem Shipbuilding Corp'n*, 303 U. S. 41) That this is the correct construction to be placed upon the *Falbo* decision seems to be supported by the decision of this court in *Billings* v. *Truesdell*, 321 U. S. 542. There it was stated that it was necessary for one to report at the induction station in order to exhaust his administrative remedies, but that he could not be forced to submit to induction because if he were forced to be inducted that would make a trap of the *Falbo* decision. The trap referred to appears inexorably to be submission to induction as a condition precedent to judicial review after a completion of the selective process. *Cf.* Biggs, C. J., dissenting, *United States* v. *Estep* (CCA-3) 150 F. 2d 768, No. 292 October Term 1945, certiorari granted Oct. 8, 1945, Record p. 301.

Yakus v. *United States* (321 U. S. 414) does not support the conclusion of the court below and the argument of the Government, that submission to induction is necessary to completely exhaust all administrative remedies. The decision in the *Yakus* case is distinguishable because there yet remained in that case a clear statutory remedy under the Act by appeal to the Emergency Court and thence to this court by petition for writ of certiorari. Of course, if a statutory remedy is provided in an act creating an administrative agency which suffices to protect the interest of the person involved and he fails to avail himself of such administrative remedy, he has not exhausted the administrative process so as to qualify himself for judicial review. There is no such provision in the Selective Training and Service Act for appeal to the Emergency Court. Therefore the *Yakus* decision can be put aside as distinguishable because falling in the same category as do *Falbo* v. *United States* (320 U. S. 549) and *Myers* v. *Bethlehem Shipbuilding Corp'n* (303 U. S. 41).

Frequently it has been argued that there is no right to judicial review of the illegal action or unlawful determina-

tion of a draft board because there is no constitutional exemption of ministers from military service. Such argument is beside the point. It is begging the question. It is entirely immaterial whether one is constitutionally exempt from military service in deciding whether an administrative tribunal has exceeded its jurisdiction, acted arbitrarily, or violated the rights of a person to procedural due process contrary to the Fifth Amendment to the Constitution. There are hundreds of administrative agencies, created by scores of acts of Congress, that operate in fields of human endeavor where there are no constitutional guaranties whatever. Nevertheless the courts have unhesitatingly allowed judicial review of administrative lawlessness in all these fields where the rights of the persons involved are not protected by some express mandate of the Constitution. Indeed, administrative agencies are as much subject to the restraint of the due process clause of the Fifth Amendment as are judicial and legislative bodies. Regardless of whether the subject matter is guaranteed by the Constitution, one is still entitled to fair dealing and honest determination at the hand of administrative agencies. Absence of a constitutional guarantee of the subject matter regulated by the administrative agency does not confer upon draft boards unlimited authority to act as tyrants and oppressors and to become the sole judges of the extent of their power. They are restrained by the same rules of administrative law that govern all other administrative agencies. It is this restraint that is desired to be placed upon the draft boards here.

The fact that the authority of Congress may be unlimited by the Constitution in the raising of an army in time of war does not help the Government in its argument here. Congress did not assume unlimited authority inherent in it under the Act. Congress exempted ministers from training and service. The failure of Congress to draw upon its full reservoir of authority definitely rejects the assumption that the draft boards may assume all powers not invoked

by Congress. The fact that the Constitution does not provide a "red-light" for the draft boards does not justify the draft boards running the "stop-sign" erected by Congress in providing for exemption of ministers of religion.

The fact that judicial review was given by habeas corpus under the 1917 Act should prove that is is not necessary that a minister have a constitutional right to exemption from military service before he can attack an illegal order or an arbitrary determination of a draft board. Indeed, the Government suggests that petitioner has a remedy by habeas corpus to attack such actions. Therefore, if the lack of constitutional guarantee does not forbid judicial review in habeas corpus proceedings, then by force of the same reasoning it does not preclude judicial review in defense to an indictment. These views have the support of Chief Justice Hughes who said: "Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determination of fact deemed to be jurisdictional, as underlying the authority of executive officers has been recognized." *Crowell* v. *Benson,* 285 U. S. 22, 58.

The Government contends that refusal to submit to induction constitutes such flouting of the law, defiance of the Act, and failure to co-operate in effective law enforcement of such a great degree that one guilty of such misconduct is precluded from judicial intervention to protect his rights against the lawlessness of draft boards that ordered him to report contrary to the Act. The Government likens the failure to comply with an order to report for induction to a situation in which a prisoner is indicted for escaping from a penal institution, contrary to law, is denied the right to show that his original sentence was invalid, in defense to prosecution for breaking jail. *Bayless* v. *United States,* 141 F. 2d 578, certiorari denied 320 U. S. 748; *United States* v. *Jerome,* 130 F. 2d 514, 519, cert. den. 317 U. S. 606.

Again it has been unfairly compared to a person illegally resisting arrest in spite of his innocence of the crime for

which he is apprehended. *Giese* v. *United States*, 143 F. 2d 633, 635, aff'd per curiam 323 U. S. 628. These analogies are wholly inapposite.

In the case of a person guilty of forcibly breaking out of custody the offense is separate and distinct and the enforcement of the law which he is charged with violating is in no way dependent upon the prosecution and judgment that committed him to the institution. In the situation here, the prosecution is based directly upon an administrative order and it is not a separate crime, as in the case of a fugitive from a prison. The unlawful resistance of arrest based upon a valid warrant is not analogous. In such case there is opportunity to determine the issue raised at a later step in the judicial proceedings instituted by the warrant for arrest; whereas in the present case an effort has been made to have a judicial determination of the validity of the order (which is analogous to the warrant) but such judicial determination was denied.

Assuming, however, that the analogy of resisting arrest is in point, if the warrant was invalid the person arrested could forcibly resist the officer to the point of killing, if necessary, in self-defense, without violating any law. Moreover, the order of the draft board is not analogous to a warrant, commitment or judgment so as to constitute legal process valid on its face. It is an order of an administrative agency, and its validity depends not upon the recitals appearing on the face of the order but upon the authority and jurisdiction of the draft board to act. Therefore it is incumbent upon the Government to prove that the draft board had jurisdiction over the registrant and authority to classify him as liable for training and service and to order him to report. In other words, the resistance or failure to comply with the order that precipitates the judicial proceedings is sufficient to place in issue the legality of the process so as to require judicial review of its validity.

If the Government's argument of resistance or defiance of the law is carried to its logical conclusion, then practically

every defense in every criminal case could be denied. Mere defiance of a draft-board order by refusal to abandon civilian status and submit to military jurisdiction does not constitute flouting the law so as to forfeit the right to challenge the validity of the administrative action on which it is based. Even persons guilty of murder, rape and treason are entitled to due process of law in criminal proceedings charging them with their respective crimes. The murderer has the right to show in defense to an indictment that he shot in self-defense. The rapist has the right to show that the act was committed with consent. If flouting the law by refusing to comply with the draft-board order is ground for denying a registrant the right to challenge its validity, then by force of the same reasoning all other defenses in every other criminal trial could be denied because they, too, flouted the law by violating it.

The argument that denial of the defenses discourages violation of the Act is equally specious and factitious. If that theory were true, then the lawmakers and law-enforcers have overlooked an effective way of preventing crime. If true, that denial of defenses discourages commission of crime, then it should be applied in every case, which would lead to the conviction of the innocent as well as the guilty.

The doctrine of denial of defenses because of contempt of the law and flouting the orders of administrative and judicial officers has never been approved by this court. In *Hovey* v. *Elliott*, 167 U. S. 409, 413-415, 417-418, this court reversed a judgment where the answer of the defendant had been stricken because of contempt of court. The court held that the entry of the judgment without affording an opportunity to defend was a violation of the citizen's rights of due process.

The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 274, 277-278. There the court said: "Wherever one is assailed in his person or his property, there he may defend, for the liability

and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." See also *McVeigh* v. *United States*, 11 Wall. 259, 267; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. (U. S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

The host of lower court decisions holding that habeas corpus after induction is the only remedy fail to point to any part of the Selective Training and Service Act of 1940 that justifies such conclusion. Indeed, the first decisions under the 1940 Act (*United States* v. *Grieme* (CCA-3) 128 F. 2d 811; *United States* v. *Kauten* (CCA-2) 133 F. 2d 703) that became the precedents for the multitude of decisions which followed, assumed that habeas corpus was available as the only remedy because of the numerous decisions under the 1917 Act (40 Stat. 76, 50 U. S. C. 226, "Selective Service Law of 1917"), which provided for automatic induction. The nature of the 1940 Act is altogether different from the 1917 Act. The present Act provides for induction upon the registrant's voluntarily participating in an induction ceremony following selection. A registrant is not automatically subject to military jurisdiction until he submits to the induction ceremony. After having completed the selective process he is confronted with the induction process. He has the choice of submitting to military jurisdiction and becoming amenable to the rigid rules and regulations of the armed forces, or the choice of refusing to submit to the induction ceremony and being prosecuted in the district courts pursuant to the criminal sanctions clause (Sec. 11) of the Act. *Billings* v. *Truesdell*, 321 U. S. 542.

It seems that if Congress had contemplated habeas corpus as the remedy it would not have adopted Senator Bone's amendment to the Burke-Wadsworth Bill and made it a part of the 1940 Act. If Congress intended that all persons subject to the jurisdiction of the boards should perform military service and that habeas corpus was the only method of attacking the invalidity of the administrative actions, it would have provided expressly for habeas corpus as the only remedy, or would have made the method of induction the same as or similar to the induction process of the 1917 Act. For the 1940 Act Congress must have had in mind to eliminate habeas corpus as a remedy, entirely. The operation of the 1917 Act showed that habeas corpus after induction as a remedy for reviewing the determinations and orders of draft boards resulted in a dangerous interference with the training of the armed forces in time of national peril. The situation was depicted by the Provost Marshal General in his final report to the Secretary of War, where, *inter alia*, he said: "During this draft the practice of serving writs of habeas corpus on the officers of the bureau became so prevalent as to interfere seriously with the progress of the business." The fact that the courts have universally entertained applications for writs of habeas corpus under the 1940 Act does not prove the Congressional intent that habeas corpus should be the remedy. There are other considerations that lead to the conclusion that habeas corpus was not contemplated by Congress as a remedy.

Congress intended that those charged with the training of men for service in the armed forces should be free from any outside influences or litigious interruptions that would defeat the purpose of effectively training the army. While it may be more convenient for the Selective Service System and the Department of Justice to demand that one submit to induction and then test the validity of the order on a writ of habeas corpus, it is certain that it would be highly inconvenient to the armed forces and throw a great burden upon

the Army and the Navy if such were the sole remedy of settling controversies between registrants and their respective draft boards. In that event the armed forces are bothered and burdened with an answer to and litigation of petitions for writs of habeas corpus. It seems obvious that Congress intended to remove litigious controversies between registrants and draft boards from the armed forces and to confine them to the federal district courts. Allowance of the defense in criminal cases presents a lesser danger to raising an army and navy than allowance of review by habeas corpus presents a danger to training and service. The very fact that Congress provided for prosecutions under Section 11 of the Act in the district courts shows the desire of Congress to eliminate entirely litigious interruption of training and service. No theory of policy or practicability to the Selective Service System and the Department of Justice supports the distortion of the obvious intent of Congress.

Induction is, moreover, a process separate from selection, as has been seen. (*Billings* v. *Truesdell*, 321 U. S. 542) Induction is the result of a voluntary step taken by the registrant at the induction ceremony, indicating his willing submission to induction. Since submission to induction is voluntary, there is present the issue of waiver of the right to challenge the administrative action and a waiver of the right to the writ of habeas corpus. The voluntary submission to induction is the same as voluntary submission to custody for the purpose of securing the writ of habeas corpus. The courts have held that such voluntary submission constitutes a waiver of the right to the writ of habeas corpus: *McNally* v. *Hill*, 293 U. S. 131, 135-139; *Baker* v. *Grice*, 169 U. S. 284, 293-294; *Ex parte Simon*, 208 U. S. 144. Compare *Estep* v. *United States*, CCA-3, 150 F. 2d 768, Biggs, J., dissenting, at pages 302 to 303 of Estep record.

Moreover, habeas corpus after submission to induction cannot be constitutionally required as the only remedy for judicial review of an illegal draft-board determination.

because it requires the registrant to submit himself to greater penalties than the law otherwise would require in order to procure judicial review. Such penalties are so serious as to dissuade the most courageous of registrants. *Ex parte Young*, 200 U. S. 123, 147; *Wadley Sou. Ry.* v. *Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

By submitting to induction the registrant abandons his civilian status and all civil rights. Immediately he becomes amenable to the military law. For slightest infractions of military regulations he is punishable at the pleasure of court-martial tribunals without recourse to the civil courts. His voluntary entry into the armed forces even for the purpose of settling a controversy is a grave step, fraught with dangers and serious consequences. His new responsibilities as a soldier cannot wait until he has settled his controversy by habeas corpus in the civil courts. A failure to strictly and promptly comply with all military orders may bring the death penalty. (Articles of War, Art. 64, Sec. 1, chap. 2, Act of June 4, 1942, 41 Stat. 787; *Manual for Courts-Martial, U. S. Army* (1928), page 218.) The fact that he may have the right to petition the civil courts for a writ of habeas corpus does not save him from being court-martialed or incurring the most severe penalty of military law. If he is found to be subject to military jurisdiction, then for him military rules and regulations are due process of law. If he fails to file his petition or for any reason is unable successfully to prosecute it in the trial court and upon ultimate appeal to this court, he is certain to be subjected to severe penalties if he attempts to claim his rights or settle his differences with the draft boards in the armed forces. Penalties thus incurred in order to obtain judicial review by way of habeas corpus are far more severe than any that might be inflicted should he be unsuccessful in the civil courts.

Irreparable injury to which he is thus subjected, if forced to submit to induction as a means of testing the

validity of the order, must be conceded to be greater than any inconvenience or injuries this court has held in other cases to be grounds for allowing judicial review prior to compliance with administrative process.[1] In World War I there were over 500 court-martial cases of conscientious objectors.[2] Records of the Office of the Judge Advocate

[1] Grave problems faced by civil and military authorities in the last war are calmly analyzed in "The Conscientious Objector" (21 Columbia U. Q'terly 253) (1919) by Harlan F. Stone; see also, *Statement by the Third Assistant Secretary of War Concerning the Treatment of Conscientious Objectors in the Army* (1919), Government Printing Office; *The Conscientious Objector* (Boni and Liveright, New York, 1919), Walter Guest Kellogg, Major, Judge Advocate, U. S. A., chairman, Board of Inquiry.

[2] The *Statement* (Note 1, supra) includes the following summary of court-martial cases of conscientious objectors compiled to June 7, 1919 (pp. 53-54):

Tried by courts-martial	504
Acquitted	1
Convicted and sentenced	503
Disapproved:	
By reviewing authority	3
On recommendation of Judge Advocate General	50
Effective sentences	450

ORIGINAL SENTENCES OF COURTS

Death	17	2 years	3
Life	142	50 "	3
10 years	89	8 "	1
20 "	73	11 "	1
25 "	57	12 "	1
15 "	47	13 "	1
5 "	29	18 "	1
30 "	19	28 "	1
3 "	5	45 "	1
1 year	4	99 "	1
40 years	4		
Less than 1 year	3		503

(*Concluded on next page*)

General show that "since Pearl Harbor" the treatment of Jehovah's witnesses and conscientious objectors inducted has been severe.[3] To one not subject to duty of training and service imposed by the Act, the order to report for induction is the equivalent of an order banishing him from his position in society, and is, therefore, a very severe penalty, and one to which he should not be required to submit without opportunity for judicial review.

Thus it is apparent that if one is forced through duress to submit to induction in order to obtain judicial review, a trap has been made out of the *Falbo* case, as was stated by Mr. Justice Douglas in his opinion in *Billings* v. *Truesdell*, 321 U. S. 542, 554-555.

Moreover, if the registrant is not sufficiently courageous to defy the representatives of the armed forces, or if he should desire to render military service and thus stay at peace with the armed forces and avoid court-martial trouble and controversy with the military authorities until his habeas corpus proceedings are successfully terminated,

(*Concluded from preceding page*)

SENTENCES AS FINALLY EXECUTED AFTER REVIEW BY REVIEWING AUTHORITIES AND BY JUDGE ADVOCATE GENERAL'S OFFICE

25 years	166	35	"	1
10 "	94	8	"	1
15 "	65	11	"	1
20 "	49	12	"	1
5 "	32	13	"	1
30 "	18	18	"	1
3 "	8	28	"	1
1 year	4	Sentence disapproved		
Less than 1 year	2	and accused released		53
2 years	2	Sentence suspended		1
50 years	2			
				503

Sentences mitigated by reviewing authorities	185
Sentences mitigated on recommendation of Judge Advocate General	11

[3] Brutality suffered at hands of military authorities by some of Jehovah's witnesses who reported for induction has also been noticed in the public press; e. g., *Time* magazine, April 19, 1943, p. 26.

it is likely that he will have been held to have waived his right to challenge military jurisdiction. It has been so held in some cases. *Mayborn* v. *Heflebower* (CCA-5) 145 F. 2d 864, cert. den. 65 S. Ct. 1087; *Catovolo* v. *Hibbs* (CCA-5) 145 F. 2d 866, cert. den. 65 S. Ct. 1087.

The requirement of submission to induction as a condition precedent to judicial review is tantamount to trial by ordeal and trial by battle that flourished in the days of the Inquisition and the "dark ages". It is like telling a man to walk barefooted over glowing coals or over red-hot plowshares before giving him an opportunity to be heard. *Encyclopedia Americana* (1940 ed.) Vol. 20, p. 752; cf. *Hurtado* v. *California,* 110 U. S. 516, 529.

Furthermore, to require one to submit to induction, especially in the case of a minister who has conscientious objections to military service, is tantamount to imposing a test oath which it may be impossible for him to take, and thus judicial review is forever withheld because he refuses to violate his conscience. *Cummings* v. *Missouri,* 4 Wall. 277, 320-332.

Surely Congress did not intend to deny judicial review to exempt persons solely because they would not submit to a surrender of their rights, their conscience and their covenant with Almighty God by taking an oath or going through a ceremony in order to get judicial review. It can be easily understood why Congress would require one to submit to induction in order to raise an army or navy, but it is inconceivable that Congress would limit judicial review of illegal draft-board action affecting an exempt person to such time that such exempt person has submitted to induction.

Induction is "the end product of submission to the selective process and compliance with the orders of the local board." *Billings* v. *Truesdell,* 321 U. S. 542. If the Act be given a construction so as to require an exempt registrant to submit to the end result, then an innovation has been made in the field of administrative law never heretofore heard of. Such novel interpretation requires the aggrieved

person to comply with and satisfy the final judgment and order of the aministrative agency before attacking it. Never heretofore has such a rule been invoked in the field of administrative law. It would be extending the doctrine of *Myers* v. *Bethlehem Shipbuilding Corp'n* (307 U. S. 41) and *Endicott-Johnson Corp'n* v. *Perkins* (317 U. S. 501) entirely too far. It is stretched to the breaking point. Final orders of administrative tribunals do not stand on any higher plane than do the final judgments of judicial tribunals. A litigant cannot be required to satisfy a judgment rendered against him before he can obtain relief or appeal from the illegal judgment rendered against him. There is no reason or justice to require an exempt person to satisfy and fully comply with the final order of the draft board by submitting to induction as a condition precedent to obtaining judicial review. It is entirely unreasonable to suppose that Congress would provide for the exemption of ministers in Section 5 (d) of the Act and then say that such exempted person would have to submit to induction in compliance with the order which is the result of administrative lawlessness before the exempt person can protect himself and secure judicial relief.

It is wholly figmentary to contend that Congress intended that the vice-president of the United States, all members of Congress, all members of the legislatures of the states of the Union, all governors and all judges of all courts of record, can be required to submit to induction and assume military status before they would be entitled to protect themselves from illegal usurpation of authority by the draft boards contrary to the Act of Congress. While it may be assumed that a writ of habeas corpus is an adequate remedy to protect the rights of a registrant *not exempt* and who is liable for training and service under the Act, it is quite certain that Congress did not intend that habeas corpus should be the only remedy available to a registrant exempt under the Act. By providing for prosecution of alleged delinquents in the federal district court,

and by writing into the Act a provision for the exemption of ministers of the gospel, it is clear that Congress did not intend that such class of persons should surrender all civil rights as a condition precedent to judicial review. It is fantastic to suppose that a civilian exempt from duty should give up his liberty and assume military status as the cost for a judicial determination of the administrative lawlessness from which he suffers. Certainly Congress did not intend that exempt persons should surrender their right to a speedy and public trial in the neighborhood of their homes as payment for failure to comply with the illegal order of the draft board.

As compared to the right to challenge the invalidity of the draft-board order in defense to an indictment brought in the district court, the writ of habeas corpus after induction is wholly illusory. It has been suggested as a remedy and dangled before the eyes of the exempt registrant in an effort to force him, coerce and cajole him into submitting to induction and assuming military status. It is fundamental that the petition for writ of habeas corpus can be brought only where the inductee is held in custody, or where his superior officer of the armed forces is located, or where the civilian public service camp is situated. The place where an inductee may apply for a writ of habeas corpus is frequently hundreds, if not thousands, of miles away from the scene of the controversy. The inductee is at a distinct disadvantage, being removed to such distance from his home that he is out of touch with friends, relatives, and counsel. Moreover, habeas corpus being a civil action that requires the inductee to make the initiating move, it may not be available to him because of lack of funds or other reasons. The difficulty of obtaining witnesses and securing records at such great distance from the place where the draft board is located frequently would make the application for writ of habeas corpus impossible, impractical or impotent.

It is almost always the case that when a selectee classified as a conscientious objector is ordered to report for work

of national importance at a civilian public service camp he is required to travel halfway across the country, and sometimes all the way across the continent, to reach the camp designated for his internment for work. In the case of one inducted into the armed forces, he may be immediately taken to some military camp thousands of miles away from his home. Indeed, he may be shipped to some foreign shore where the writ of habeas corpus is wholly unavailable. Frequently inductees in the armed forces are moved from one camp to another, out of the jurisdiction of one federal district to another federal district. Being kited around in that manner, it is obvious that one petition after another could be dismissed. Indeed, one appeal after another could be dismissed, the reason for dismissal being that the transfer of the prisoner would make the action moot. *Weber* v. *Squire*, 315 U. S. 810; *Ex parte Weil*, 317 U. S. 597; *Turnello* v. *Hudspeth*, 318 U. S. 792; *Zimmerman* v. *Walker*, 319 U. S. 744.

In *Hirabayashi* v. *United States* (320 U. S. 108, 109) the reference by Mr. Justice Douglas, in his concurring opinion, to that line of cases under the 1940 Act which require that the registrant must submit to induction and obtain habeas corpus to review the legality of the action of the draft board is not a holding that is precedent on the question presented here. His opinion was written before the decision of this court in the case of *Falbo* v. *United States* (320 U. S. 549). Whatever may be said as to his dictum in the *Hirabayashi* case, it seems plain that what he said in the court's opinion in *Billings* v. *Truesdell* (321 U. S. 542), where the Act in question was directly under consideration, would be of greater weight and throw more light on the question here involved than would his dictum in the *Hirabayashi* case.

It is manifest that the Act is silent as to habeas corpus as a remedy. There is nothing in the Act and there is nothing in the Regulations that even intimates that habeas corpus after induction is available as a remedy. Indeed,

there is nothing in the Act or Regulations that says anything about judicial review of illegal draft-board action. Moreover, there is nothing in the Act or Regulations that suggests induction as a part of the process to obtain relief from unlawful action of the draft boards. Consequently, the petition for writ of habeas corpus is not an administrative remedy. It is a judicial remedy that has been devised by the courts. A registrant illegally abused by the draft boards is not required to exhaust judicial remedies before claiming his rights. The maxim of exhausting remedies before appealing to the courts is confined to the exhaustion of *administrative* remedies expressly provided for in the Act. It has been held that a person is not required to exhaust judicial remedies before invoking judicial review of administrative action in the manner chosen. *Lane* v. *Wilson*, 307 U. S. 268; *Railroad & W. Comm'n of Minn.* v. *Duluth St. Ry.*, 273 U. S. 625.

Submission to induction does not contemplate an administrative hearing on the claimed exemption from duty. When one submits to induction the armed forces do not settle his dispute with the draft boards except that if he fails to render faithful obedience to all military orders the inductee will be promptly court-martialed. Further steps that do not contemplate a hearing or administrative relief to the inductee need not be complied with. *Kansas City So. Ry.* v. *Ogden Levee Dist.* (CCA-8) 15 F. 2d 637.

Since the Government cannot point to any administrative step under the Act after induction into the armed forces that would provide for the protection of the inductee from court martial for refusal to perform military service, exempt him from military duty until his controversy was settled, and protect his rights to exemption from duty under the Act by correcting the illegal administrative action by the armed forces, it cannot be said that induction is necessary in order to completely exhaust available administrative remedies. Certainly induction is not a part of administrative remedies contemplated to protect the rights

of registrants from the lawlessness of draft boards acting in defiance of the Act and Regulations.

To hold that habeas corpus is the only remedy under the Act is judicial legislation which perverts the 1940 Act into a form exactly like the 1917 Act. Congress did not intend that induction and habeas corpus, as judicial remedies for illegally treated registrants, should be dangled before their eyes as a means of relief in order to cajole them into voluntary enlistment in the armed services. Thus through coercion and duress applied to an illegally treated registrant the Act would be and, indeed, has been transformed into an act very similar to the 1917 Act that casts into the armed forces the controversy between the registrant and the draft board, which is the very evil Congress intended to avoid by providing in the 1940 Act for prosecutions in the federal district courts through adopting Senator Bone's amendment to that Act. If the silence of the Act does not prohibit the admitted review by habeas corpus, because of the constitutional guarantee of the writ, then by stronger reasoning the due process clause requires that silence of the Act about available defenses against prosecutions under the criminal sanctions clause of Section 11 does not deny review of illegal draft-board action in defense to the indictment.

If silence of the Act is ground to deny judicial review in criminal action, then the courts ought to deny all judicial review, including review by habeas corpus, on the ground of silence of the act.

The Government has confused the selective process with the induction process in arguing that administrative remedies are not exhausted until the registrant has submitted to induction. The administrative remedies, for the purpose of determining when there shall be judicial review, terminate when the registrant goes to the end of the *selective* process and when his next step would be to enter into the armed forces or a civilian public service camp.

Acceptance of the registrant, making him a selectee

under the Act, terminates the *selective* process and his administrative remedies. See the discussion of the various regulations pertaining to selection and induction in *Billings* v. *Truesdell*, 321 U. S. 542, where the distinction between selection and induction is defined and preserved.

In instances where this precise question has been taken before the appellate courts of some of the states, it has been held that one proceeded against in a criminal prosecution may show in defense thereto that the administrative determination was illegal, in excess of authority conferred by the statute, arbitrary and capricious, or contrary to the undisputed evidence. *People* v. *McCoy*, 125 Ill. 289, 17 N. E. 786; *Fire Dep't of City of N. Y.* v. *Gilmour*, 149 N. Y. 453, 44 N. E. 177; *State* v. *Rachshowski*, 86 Conn. 677; *People* v. *Kaye*, 212 N. Y. 407, 416; *State* v. *Weimer*, 64 Iowa 243; *State* v. *Kirby*, 120 Iowa 26; *Crane* v. *State* 5 Okla. Cr. 560; *Richter* v. *State*, 16 Wyo. 437.

The Massachusetts Supreme Judicial Court said: "He would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the inspector." *Stevens* v. *Casey*, 238 Mass. 368, 117 N. E. 599.

Throughout the history of this court it has been held that acts of Congress are subject to judicial review. This was first established in *Marbury* v. *Madison*, 1 Cranch 137.

Are the acts of administrative agencies on a higher plane than the acts of Congress?

Must it be said that the determinations of administrative agencies are beyond judicial review in defense to indictments charging one with a violation thereof?

If true, then a new era has been reached in the history of this government. If so, then Congress is found to have created a gigantic administrative instrument that can develop into a Frankenstein monster with powers even greater than Congress has—the unique power of acting free

of all judicial restraint. In this situation the courts will appear to have been bled lifeless, with judicial power, wholly impotent to protect the rights of the citizen. This situation is contrary to the conception of government envisioned by the framers of the Constitution in adopting that document of fundamentals of government.

"No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole government."—Daniel Webster (Webster's *Works*, Vol. 3, p. 176).

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing Smith and Estep their defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, Smith and Estep will be denied their right to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution.*

The law of the land in all common-law countries, boasting as they do of enlightenment and liberty, requires that one indicted for crime shall have the right to defend by proving his innocence. The mere bringing of an indictment implies that the one indicted shall have the right to defend. Throughout history this right has been recognized. In *Doctor Bentley's Case* (*Rex* v. *Cambridge University*, 1718, 1 Strange 557, 567) a hearing and defense was denied. In setting aside the judgment of conviction, the court said:

"The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam (says God), where art thou? Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." *Genesis* 3:9, 11, 13.

The barbarians and ancients permitted a defendant to be heard and to make his defense. Seneca, the Roman philosopher, in the days of Nero wrote:

> "Who hath adjudged of aught, one side unheard,
> just though the judgment, were himself unjust."

In his work, *Due Process of Law*, McGehee says: "Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or 'due process of law', but the ideal was not confined to one system of jurisprudence, and was common to thoughtful men everywhere." (Page 73)

No better definition of the term "due process of law" can be given than that stated by Daniel Webster in the *Dartmouth College* case. (*Dartmouth College* v. *Woodward*, 4 Wheat. 519) In his argument there he said: "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." See Cooley, *Constitutional Limitations* (8th ed.), Vol. 2, p. 736; *Works of Webster*, Vol. V, p. 487.

In *McVeigh* v. *United States*, 11 Wall. 259, 267, this court said that when one is assailed by an indictment or proceeding in the United States District Courts "he could

defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administrative of justice."

In *Rogers* v. *Peck*, 199 U. S. 425, 435, this court said that defendant in a criminal case must be given an adequate and full opportunity to be heard in defense to an indictment.

In *Ong Chang Wing* v. *United States*, 218 U. S. 272, 279, the court said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, . . . with an opportunity to be heard, . . . then he has had due process of law."

The construction of the Act so as to deny judicial review of administrative action, which concededly is available upon petition for writ of habeas corpus, is a rank denial of due process of law and of the right to be heard in one's defense. *Hovey* v. *Elliott*, 167 U. S. 409, 413-418: "[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of

the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?"

In *Edwards* v. *United States*, 312 U. S. 473, this court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

This court, in *Dowell* v. *United States*, 221 U. S. 325, 330, held that an act whereby an administrative agency determined the facts of one's duty and the circumstances of his violation thereof, without an opportunity to be heard in his defense in court, was unconstitutional. Speaking of the constitutional provisions, the court said: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In *Wong Wing* v. *United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. This court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." See also *Diaz* v. *United States*, 223 U. S. 442; *Lisemba* v. *California*, 314 U. S. 219, 236.

This court has declared that if a person is subjected by law to the jurisdiction of an administrative agency and is prosecuted in the district court for the crime of violating an administrative order of an "officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." (*Panama Ref'g Co.* v. *Ryan*, 293 U. S.

388) This court has said that the legislature cannot withhold from the courts the power to inquire into the authority and legality of the action of an administrative agency. In *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, the court said that ample provision should be made in the law for "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

In *Dayton Goose Creek Ry.* v. *United States*, 263 U. S. 456, 486, the court said: "No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under . . . the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution." See *St. Louis and S. F. Ry.* v. *Gill*, 156 U. S. 649, 666, where it is said: " . . . if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties." See, also, *Chicago M. & S. P. Ry.* v. *Minnesota*, 134 U. S. 418, 456-457, where it is said: "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judically of the truth of a matter in controversy, and substitutes therefor, as

an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The administrative agency cannot be allowed the final say as to facts determining its authority and jurisdiction, without violation of the due process clause of the Fifth Amendment. *Jones* v. *Securities & Exch. Comm'n*, 298 U. S. 1, 23-24.

The second circuit court of appeals has held, in *Trainin* v. *Cain*, 144 F. 2d 944, that if the Selective Training and Service Act of 1940 is construed so as to deny review, regardless of what may be the facts, it would be in direct conflict with the due process clause of the Fifth Amendment to the Constitution. A law which creates an administrative agency that permits the agency to be the judge of its power, and which prohibits judicial review of the illegality of the administrative determination, is a violation of the right of due process of law. " . . . On the other hand, to deny review, whatever may be the facts, so long as the forms of law have been followed, is to constitute arbitrary and unfair action, as was held in *Arbitman* v. *Woodside*, supra [258 F. 441], which is not consonant with our historic ideas of due process." *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944. Indeed, that was the holding of this court in *Chicago M. & S. P. Ry.* v. *Minnesota*, 134 U. S. 418, supra.

If the Act is construed so as to deny judicial review of the alleged illegality of the draft-board order and the right of trial by jury, then the Act and the construction placed thereon are unconstitutional, because directly in conflict with the due process clause of the Fifth Amendment to the Constitution.

If the Act is construed so as to deny the exercise of the judicial function by the courts for protecting the rights of the citizen, the powers of the courts are sapped, contrary to Article III of the Constitution.

Every student of history knows that the most significant

victory for freedom of the people and justice has been accomplished by and in the courts. The liberties of the citizen are so closely bound up with the complete independence of the judiciary that all beginnings of encroachment by administrative agencies should be shunned. When for any reason the judiciary loses its functions and powers granted by the Constitution, the administration of justice is sacrificed to its enemy, despotism.

The distinguishing characteristic of the American system of government is the division of powers. The greatest feature of that division is that the guardianship of all liberty, together with the power of checking all encroachments thereon, is vested in the judiciary, which is supreme over all other departments. Haines, *The American Doctrine of Judicial Supremacy* (University of California Press, 1932), pp. 23-27.

"All the powers of government—legislative, executive, and judiciary—result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government." (Jefferson's *Works*, Vol. 3, p. 223.)

The supremacy and independence of the American judiciary were first announced by this court in *Marbury* v. *Madison*, 1 Cranch 137: "It is emphatically the province and duty of the judicial department, to say what the law is."

Chief Justice Taney made a studied examination of the history of the judiciary and its powers in the appendix to his opinion in *Gordon* v. *United States*, 117 U. S. 697. The fact that honest and well-intentioned persons have been persuaded that the rights of the citizens are perfectly safe in the hands of executive agencies does not remove the danger that inheres in denying the judicial function review of such agencies' determinations.

In *Dyson* v. *Attorney General* (English Court of Appeal) 1911, 1 K. B. 410, 423, 424, Lord Justice Farwell said, *inter alia*, " . . . there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour

of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. . . . In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deane* v. *Attorney General* (1 Y. & C. Ex. at p. 208): 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred.' I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression."

The very purpose of the judiciary was that it might stand like a great rock to which the citizen may flee, set his feet and be safe amidst the torrents and shifting currents of public policy. The inevitable inequalities that flow from administrative action are not so dangerous in a country where the administrative agency and every citizen know that the acts of the administrative agency are subject to judicial public scrutiny in a court of law. There the citizen cannot be delivered over to a department and forced to submit to the judgment of an administrative agency which acts as prosecutor, witness and judge at the same time.

On the occasion of his introducing the proposals for the first ten amendments to the Constitution, Mr. Madison said concerning the courts that they would "consider themselves in a peculiar manner the guardians of those rights; they would be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." (1 *Annals of Congress*, 439)

In *Crowell* v. *Benson* (285 U. S. 22, 56-58) it was held that Congress could not completely oust the courts of the power to review all determinations of fact and law of administrative agencies. The court said that to make the determinations final and place them beyond reach of the courts on review "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system . . ." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 50-52.

Those who favor denial of judicial review of draft-board findings advocate that there would be an endless stream of litigation, which would frustrate the intent of Congress. That contention lacks candor. It is an adroit way those who favor the supremacy of the administrative agency over the courts have in arrogating to themselves despotic powers. They say that the purpose of that is to save the citizen the burden and expense of lawsuits. Really what is desired is that the administrative agency be left to be the final and supreme arbiter of the extent of its power. The reason courts exist in the civilized community is that the founders of the government believed that happiness consisted in the greatest possible amount of litigation among the greatest possible number of citizens. The value of having courts of law is not in the number of cases decided by them. On the contrary, it is the universal knowledge of their existence and faith in justice which reduces to a minimum the number of administrative

agencies and citizens willing to behave so as to expose themselves to the jurisdiction of the courts. Knowledge that the court machinery exists and that when the judicial function is exercised it is employed impartially and with skill has the effect of rendering its employment unnecessary except in unusual and extraordinary cases. (Hewart, Lord Chief Justice of England, *The New Despotism*, Ernest Benn, Ltd., London, 1929, pp. 154-155, 156)

"By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. . . . The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them." (Cardozo, *The Nature of the Judicial Process*, New Haven 1921, pp. 92-94)

"In Anglo-American jurisprudence, government and law have always in a sense stood opposed to one another; the law has been rather something to give the citizen a check on the government than an instrument to give the government control over the citizen. (See Sir J. F. Stephen, *History of the Criminal Law*, ii, 65) There is a famous passage, which was long attributed to Bracton, to the effect that 'the King has a superior, to wit, the law; and if he be without a bridle, a bridle ought to be put on him, namely, the law.' (Bracton, fol. 34; see McIlwain, *High Court of Parliament*, p. 101; Maitland, *Bracton's Note Book*, i, 29-34.) This 'rule of law', as Dicey calls it, or 'supremacy of law', in Lieber's phrase, has been uniformly treated as the

central and most characteristic feature of our Anglo-American juristic habit; and nothing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the comon law. That government officials, on the contrary, should themselves assume to perform the functions of a law court and determine the rights of individuals, as is the case under a system of administrative justice, has been traditionally felt to be inconsistent with the supremacy of law. It was the ground of attack on the Court of Star Chamber, and on equity jurisdiction in the days when the Chancellor was still mainly an administrative officer of the King. Lieber mentions freedom from 'government by commissions', and from the jurisdiction of executive courts, as one of the elements of Anglo-American liberty." (Dickinson, *Administrative Justice and the Supremacy of Law in the United States,* Harvard University Press, 1927, pp. 32-33)

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II. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, the Act will be transformed into a bill of pains and penalties contrary to Article I, Section 9, Clause 3 of the Constitution.*

"No bill of attainder or *ex post facto* law shall be passed." *

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the

* Art. 1, Sec. 9, Cl. 3. Recently Mr. Justice Black had occasion to stress that provision of the Constitution and this court's decision relative thereto in *Cummings* v. *Missouri,* 4 Wall. 277, in his concurring opinion in *Keegan* v. *United States,* No. 39 October Term 1944, decided June 11, 1945 (65 S. Ct. 1203); and also in a dissent: *In re Summers,* No. 205 October Term 1944 (65 S. Ct. 1307).

Constitution, bills of attainder include bills of pains and penalties." *Cummings* v. *Missouri*, 4 Wall. 277.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of attainders in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition. See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462, and Vol. 3, pp. 66, 67; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

Bills of attainder and bills of pains and penalties were first used in England as early as 1321. It was not until the civil war, that engendered passions, that bills of attainder were widely used. (*The Catholic Encyclopedia*, Vol. 11, p. 59) They were particularly and extensively used during the reign of the Tudor kings to accomplish acts that could not be done through the regular judicial process. *Encyclopædia Britannica*, 1940 ed., Vol. 2, p. 656.

"A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime." Cooley, *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

"The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the

most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." Story, *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216.

Here the Act and Regulations have been construed so as to require the petitioner to surrender himself to the military authorities by submission to induction, as a condition to obtaining judicial review. If he does not surrender himself and submit to the jurisdiction of the armed forces as commanded, upon his trial he is conclusively presumed to have had a duty for training and service and of having violated such duty under the Act. In defense to the indictment he cannot show that he had no duty under the Act. This is a denial of a judicial trial. He is penalized because he defied the administrative agency. If he submits to induction, a judicial trial may be accorded him if he applies for it by petition for writ of habeas corpus.

The very fact that judicial review of the administrative action is accorded by habeas corpus to a person who submits to induction and the same is denied to a person who refuses to submit to induction is proof positive that the penalty imposed against the one who refuses to submit to induction is a denial of a judicial trial. And when so applied Section 11 of the Act is thereby *transformed* into a bill of pains and penalties.

While the general type of bill of attainder is any law that deprives a person of a judicial trial, history shows that there are two specific kinds of bills of attainder that flourished in England: One was where a person was commanded to report and surrender at a certain time and place. Upon his failure thus to appear he was treated as a domestic rebel, being tried upon the conclusive presumption of the duty and the violation thereof. The other kind of bill of

attainder was where a person was denied a right for his failure to undergo a ceremony or take a test oath.

This court had occasion to examine into the history of bills of pains and penalties when its opinion was written in *Cummings* v. *Missouri,* 4 Wall. 277, 320-332. In that decision the provisions of the Missouri Constitution and statutes providing for a certain class of persons to take a test oath were declared unconstitutional because comprising a bill of pains and penalties, contrary to the Federal Constitution, Article I, Section 9, Clause 3. In that decision this court said:

"It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck,* 6 Cranch 137, Mr. Chief Justice Marshall, speaking of such actions, uses this language: 'Whatever respect might have been felt for the States sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . . .'

" . . . . The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself [submitted to induction] before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect. (Printed in 6 *Howell's States Trials,* p. 391.) [Bracketed words added]

"'A British Act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it. . . .' (*Haines* v. *Buford,* 1 Dana 510)

" . . . The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name."

Consideration of the method of trial followed in the courts of England that enforced the bills of attainder provides a striking analogy with the trial of petitioner and others of Jehovah's witnesses under Section 11 of the Selective Training and Service Act of 1940.

Richard Wooddeson, a learned scholar and contemporary of that dark period of English history, in one of his series of lectures at Oxford University, gives a description of the trial in his treatise *A Systematical View of the Laws of England* (1777), pages 621-648:

"All of the modes of criminal prosecutions hitherto spoken of, whether by impeachment or otherwise, are vindications of the laws in being, on which they are wholly founded. But besides the regular enforcement of established laws, the annals of most countries record signal exertions of penal justice, adapted to exigencies unprovided for in the criminal code. . . .

" . . . No alteration is made in the legal rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited be contested, these questions are to be decided by the same testimony as would be admissible on other trials. Neither is any varied modification of punishment. But a material innovation is made respecting the crime. For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed.

". . . It is afterward removed into the King's Bench; and there the whole being entered on record, the prisoner is asked what he has to allege, why execution should not be awarded against him. If a question of fact arises, as to identity of person, or a due surrender in time, a jury is summoned to meet instanter; and, as both of these may be termed collateral issues (that is, not the general one, which in criminal cases is 'guilty' or 'not guilty') the prisoner on the one hand seems not to be entitled to peremptory challenges, but on the other, to have a right to the full assistance of counsel."

There is a close parallel between the English bills of attainder and the construction placed upon Section 11 (50 USC App. Sec. 311) of the Act in question. Under the English procedure the person named in the bill was denied the right of a judicial trial to determine his guilt if he *failed to report* and surrender or submit at the time and place mentioned in the order. For his defiance of the order he was denied the right to prove his innocence. He was conclusively presumed to be guilty.

In the criminal proceedings brought against petitioner in the district court he was denied his right to prove that he was exempt from all duty for training and service, because a minister of religion under the Act, and that he had not failed to perform a duty under the Act solely because he failed to submit to induction. At the hearing of petitioner's indictment the issue was limited in the same way that the issues upon the trial of the ancient bills of attainder in England were limited. The sole question allowed to be determined was whether or not he complied with the order.

In England, under the bills of attainder, the only question that the courts were allowed to consider was whether the accused complied with the order demanding that he report and surrender himself.

Here, the requirement that petitioner submit to induction as a condition precedent to his obtaining judicial

review of the illegality of the draft-board order is tantamount to requiring that he submit to a *test oath.*

In other words, the construction placed on the Act, so as to afford petitioner opportunity to obtain judicial review by habeas corpus, opens a way for him to escape from the penalty imposed. However, before he can be recognized by the courts and given protection of his legal rights under the Act (according to construction placed on the Act as including a way provided for him to escape the penalty), he is required to undergo a sort of expurgatory oath. Concerning a similar method of escape from penalties, this court, in *Cummings* v. *Missouri,* 4 Wall. 277, said:

". . . This deprivation is punishment, nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of persons would be unable to take the oath prescribed. To them there would be no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act."

The Kentucky Court of Appeals, in *Gaines* v. *Buford,* 1 Dana 481, held an act of the legislature to be a bill of attainder. The legislature ordered owners of certain lands to make certain improvements on or before a certain date. Pursuant to the act, failure to comply with the order automatically forfeited the title and vested it in the Commonwealth.

In *Kentucky* v. *Jones,* 10 Bush (70 Ky.) 725, the Kentucky Court of Appeals held another act of the legislature violated the bill of attainder provision of the Constitution. The act provided for certain disqualifications of office-holders within the Commonwealth. Administrative agencies, called "boards of contest", were established. The findings of these boards were made final by the statute with reference

to the disqualification of an officeholder. If such boards found an officeholder to be disqualified, he was ordered to cease and desist from holding office. A refusal to cease and desist from holding the office constituted a crime under the statute. Jones was declared disqualified and ordered to vacate his office; and despite the order he held office and refused to vacate. He was indicted and convicted for failing and refusing to obey the order of the administrative agency. The court said:

" . . . it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that clause of the federal constitution which provides that 'no state shall pass any bill of attainder'. . . . The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts . . .

" . . . when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and determine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . .

"To admit that a contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duties, and to the determination primarily of mere questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers."

An act which undertakes to permit an administrative agency to inflict punishment, banishment or exile from the United States of a citizen, without judicial inquiry as to

whether or not he was a citizen, was held to violate the bill of attainder clause of the Constitution, in the case styled *In re Yung Sing Hee* (Circuit Court. Oregon) 36 F. 437 (1888).

A statute of Iowa which provided for "vasectomy" of habitual criminals upon the finding of an administrative agency without judicial inquiry was declared to be a bill of attainder in *Davis* v. *Berry,* 216 F. 413.

Friends of the bill of attainder found in the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 assert that the usual criminal defenses should be denied to defendants prosecuted under the Act in order to raise an army and navy, and that since men were automatically inducted under the 1917 Act without the right of a previous hearing in the courts the same method of handling cases under the 1940 Act had proved to be a deserving instrument of the nation for the discouraging of delinquencies and the promotion of criminal justice. The courts cannot assent to this declaration. The Spanish Inquisition may have used similar methods and sophistries but it can be confidently asserted that neither the Spanish Inquisition nor the Inquisition of Queen Elizabeth did go any further or employ a more cunning device than that employed by the government in the prosecution of Selective Service cases. See "Inquisition", *The Catholic Encyclopedia,* Vol. VIII, pp. 26-38.

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to submit under the Act without insisting that this is a war measure and that one who fails to submit is to be regarded as the "domestic rebels" of medieval times with no rights under the law or Constitution and that the crime is of such an odious nature that it has worked a forfeiture of even those rights which peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, with a right to a judicial trial. It is said that Jehovah's witnesses who

fail to submit to induction are nothing more than criminals. It may, for the sake of argument only, be conceded that they are such. Are they not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it please the court, are entitled to the benefit of the laws made for criminals? If the innocent have no use for them; and if the guilty have no claim on the rights conferred by these laws, then they are mere nullities.

That the Selective Training and Service Act of 1940 was adopted and adapted in the heat of impending war and a great emergency does not change it from being penal in Section 11. That the penal provision, as construed, has taken away for the contempt of the administrative agency the most valuable of all the liberties of the citizen must be admitted by all. That the draft boards have assumed judicial magistracy, deciding questions of law and innovating on the crime must be conceded. That the rules of evidence and proofs and of judicial trial have been abrogated must be admitted. That it has instituted a modern-day inquisition trial authorizing a summary method of punishing the modern-day "domestic rebels" cannot be denied, not allowing them the benefit of criminal laws.

Under the construction placed on the Act and Regulations it must be understood that the government has claimed for the draft boards of the Selective Service System omnipotent powers and that they have been emancipated of all judicial restraint when dealing with a criminal under the Act; that is to say, one who had the conviction and courage to defy the illegal order of a board. The scope of this argument and the construction thus placed on the Act and Regulations must be denounced as breathing the worst spirit of the worst men in the worst times of history. Such has been the tyrant's plea from the beginning of history of the world. It was the claim of the first dictator, Nimrod. An Athenian Assembly or a Roman Senate in its lowest state of decadence never set up larger pretensions, nor did either ever announce a more unqualified tyranny.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work which fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tyrant, and knew what oppression was. It was their mission to protect their people, who were few and weak, against the many and the strong, and established fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen, and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such as they have.

Therefore, Section 11 of the Act has been converted into a bill of pains and penalties, contrary to the clause of the Federal Constitution prohibiting enactment of bills of attainder,

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A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of their jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

The Selective Training and Service Act of 1940 provides that "except as otherwise provided in this Act, every male citizen of the United States, every male alien residing in the United States who has declared his intention to become such citizen, . . . shall be liable for training and service

in the land or naval forces of the United States." (54 Stat. 885, 50 U. S. C. Sec. 303)

"(c) (1) The Vice President of the United States, the Governors of the several States and Territories, members of the legislative bodies of the United States and of the several States and Territories, judges of the courts of record of the United States and of the several States and Territories and the District of Columbia, shall, while holding such offices, be deferred from training and service under this Act in the land and naval forces of the United States." (54 Stat. 887, 50 U. S. C. Sec. 305)

"(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act." (54 Stat. 887, 50 U. S. C. Sec. 305)

"(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion, or

(2) Who is a duly ordained minister of religion, or

"(a) . . . (2) . . . There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. . . . Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." (54 Stat. 893, 50 U. S. C. Sec. 310)

The Burke-Wadsworth Bill when introduced in the House of Representatives and Senate (H. R. 10132) did not provide that ministers of religion be exempt from all train-

ing and service. Section 7 (c) of the bill placed regular and duly ordained ministers in the class of deferments that were discretionary with the President. A hearing was had on the bill before the House Committee of Military Affairs. Certain changes were proposed and amendments submitted for consideration. Representative Martin J. Kennedy told the committee:

"To me it seems imperative that action be taken by your committee to insure that the Wadsworth bill be so modified as to make due provision for the religious life of the American people. . . . To me it seems clear that the good of the American people requires that all these classes—clergymen, seminarians, and Brothers—be exempted from service under the bill. . . . It is evident to intelligent observers that religion is the backbone of all moral conduct; religion supports authority, teaching respect for law and order. Principles deprived from religious moral teaching make the average man an honest man, a law-abiding citizen. . . . The principle, therefore, that each man should serve where he will do the most good and best further his country's interests in time of war requires that in time of war the clergy remain clergy. That is their specialty. There they are most efficient. There they are most needed. . . . The measure to be taken, therefore, is one recognizing the principle that an adequate clergy group is a really fundamental necessity in time of war and hence, parallelly, an adequate seminarian group is a real necessity in time of preparation." (*Hearings Before the Comittee on Military Affairs, House of Representatives, Seventy-Sixth Congress, Third Session, on H. R. 10132*, pp. 628-630)

Also before the Committee on Military Affairs prominent clergymen of the leading religious organizations of the world testified in behalf of the proposed amendments to the bill providing for complete exemption of ministers of religion. *Op. cit.* 299-305.

The amendments to the bill were duly approved by the committee. In due course the bill was before Congress for

consideration. In passing the Act providing for the complete exemption of ministers of religion from all training and service, Congress spoke of not taking a minister "away from his congregation" and of leaving some one at home "to preach to the people, to bury the dead and marry the youth of the land." (*Congressional Record*, Vol. 55, pp. 963, 1473, 1527)

In placing ministers of religion in the class of absolute exemptions, Congress removed the ministers from the manpower "barrel" and placed them beyond the reach of the Selective Service System. Indeed, Congress allowed the draft boards to exercise no discretion whatever in dealing with ministers of religion. In adopting the Act providing for the complete exemption of ministers, Congress intended to give persons exempt under the Act the same protection that was accorded to them under the 1917 Act. That the draft boards under the 1917 Act were considered as having no jurisdiction or authority to order ministers to take training and render service under the Act is shown in the testimony of the provost marshal general (General Crowder) before the House Committee on Military Affairs. He said:

"In the Act that is before you we have two classes of exemptions—legislative exemptions and executive exemptions. There are included in the legislative exemptions those classes whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them. There are other classes which are classified as executive exemptions, where a question of fact has to be determined. In the legislation of 1863 the judgment of the Board of Enrollment provided for in that legislation was made conclusive upon the authorities, notwithstanding which, however, the Courts undertook to inquire into the decision of the Enrolling Board in granting or refusing exemptions." Congressional *Hearings*, 65th Cong., 1st Sess., pp. 94, 95.

Under the 1940 Act the Director of Selective Service

recognizes that it is beyond the authority of the Selective Service System to order ministers to perform service. He sees that the exemption removes ministers from the exercise of the discretion conferred on him under the Act. "It is noteworthy that the language used in this section was not merely deferment, but exemption from training and service, although it was specifically added 'not from registration'." (First Report of the Director of Selective Service, *Selective Service in Peacetime,* Government Printing Office, 1942, pp. 169-170) Also the Director has stated that when it is established by undisputed evidence that a registrant is a minister, then "there was no question as to what must be done. They must be exempted from training and service." (*Selective Service in Wartime,* Second Report of the Director of Selective Service, Government Printing Office, 1943, p. 239) The discretion of the Director of Selective Service and of the draft boards, under the Act, extends to all classifications of all persons except those who are exempt by the act of Congress. The exemption provided in the Act for ministers of religion is mandatory, and the draft boards have no authority or jurisdiction to disregard the Congressional mandate.

Throughout the history of the controversy between Jehovah's witnesses and the Government under the Act the Government has stubbornly advocated the doctrine that judicial review of a draft board determination of illegal action is confined to instances where it is satisfactorily established that there has been a denial of procedural due process of law contrary to the Fifth Amendment by the agency. This is an undue narrowing of the scope of review. Moreover it is factitious to assume, as the Government does, that *due process* is confined to *procedural* due process. If the courts can inquire as to whether there has been a violation of due process of law by an administrative agency the scope of review includes not only whether there has been a violation of procedural due process but also whether there has been a violation of substantive due process of law.

Of administrative agencies this court has said that it was not "difficult for them to observe the requirements of law in giving a hearing and receiving evidence." (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 50-52) The administrative agency "may keep within the letter of the statute prescribing forms of procedure . . . and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment." (*Chicago B. & Q. Ry.* v. *Chicago,* 166 U. S. 226, 234, 235) Mr. Justice Holmes, in *Buck* v. *Bell,* 274 U. S. 207, said: "There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law. The attack is not upon the procedure but upon the substantive law." In *Whitney* v. *California,* 274 U. S. 357, 373, Mr. Justice Brandeis said: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." See, also, *Adkins* v. *Children's Hospital,* 261 U. S. 525, 530, 531 (counsel's argument).

If Congress provides for exemption of one from duty of performing military service, and such statutory exemption is arbitrarily ignored by the draft boards, their action would be without authority or in excess of their jurisdiction. In such event it would be the duty of the court to protect the rights of the registrant, as was held by this court in *Wise* v. *Withers,* 3 Cranch 331, 336. In that case the Militia Act of May 8, 1792, provided for the exemption from service of federal officers. Wise claimed exemption as a federal officer because he was a justice of the peace of the District of Columbia. He refused to perform military service. The court martial imposed a penalty against him under the act by forfeiture of the title to his property.

Pursuant thereto the Collector levied upon the property. Wise brought an action in trespass on the case against the Collector, claiming that the court martial was without jurisdiction. In spite of the fact that Wise defied the law, flouted the call for duty, this court decided in his favor, holding that he was exempt from duty to perform military service. Chief Justice Marshal said:

"The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty.

"It follows, from this opinion, that a court marshal [*sic*] has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officers are all trespassers.

"The judgment is reversed and the cause remanded for further proceedings."

In *Lehr* v. *United States* (139 F. 2d 919, 922) it was held that the draft boards under the 1940 Act have only authority to defer registrants. Concerning exemption of ministers of religion under the Act the court said:

"We take it that a person who is not within the age limits, or who is a female, or who is a minister, or who has been deferred expressly by the Act, is not an 'individual within the jurisdiction' of the Local Board, but whether we consider it is lack of jurisdiction or lack of legal power, the legal effect would be the same, and the courts can, and will, prohibit the usurpation of unauthorized power. . . . An able-bodied, nonministerial registrant, who is not within a class deferred by statute, cannot complain to the courts, when his number comes up in due course, because the Board did not see fit to grant him a deferment and

to send another young man in his place in order to fill its quota."

The *jurisdictional fact* doctrine is that where a statute purports to confer on an administrative agency a power to make decisions, but is construed as conferring that power only over, or with reference to, certain kinds of objects, situations or acts, then the fact-question of whether or not in any given case of such a decision the object, situation or act was, *in fact*, of the kind specified in the statute goes to the jurisdiction of the administrative agency to make the decision at all. It must therefore be determined independently in court, even though the determination of the fact in question had already been made, and was one which necessarily had to be made, by the administrative agency as an essential step in reaching its decision.

"More narrowly, on this theory, what the courts are concerned with is only whether the officer is, or is not, acting 'within his jurisdiction'. . . . In this form, the law of court review of the acts of public officers becomes simply a branch of the law of *ultra vires*." Dickinson, *Administrative Justice and the Supremacy of Law* (1927), Harvard Univ. Press, p. 41.

"On the doctrine of 'jurisdictional facts', the determination must be made over again, and independently, by the court or jury, in order to determine whether the administrative agency exceeded its competence." *Op. cit.*, p. 310.

In England the doctrine of judicial inquiry into jurisdictional fact findings of an administrative agency has been recognized. It is said that administrative "orders are, as they manifestly ought to be, liable to be challenged on the ground that they are not within the powers of the authority making them, or, in other words, that they are *ultra vires*." Hewart, *The New Despotism*, Ernest Benn, Ltd., London, p. 61.

"All prerogative legislation is in theory subject to review by the Courts of Law, and may be treated as void if found to be *ultra vires*. . . . Consequently, in order to ascertain

whether a particular statutory rule or order is *intra vires* or *ultra vires*, it is necessary to look at the terms of the authorizing statute to see whether the legislating authority has acted within the limits of its mandate, and, to speak generally, the validity of much statutory delegated legislation may be judicially challenged, and, if any such legislation is held to be invalid, it may be treated as void or quashed." *Op. cit.*, pp. 79-80.

To allow an administrative body to determine conclusively the limits of its own authority or jurisdiction is to permit it to determine a question of law which is exclusively the prerogative of the courts conferred upon them by the Constitution and which cannot be abdicated to the administrative agencies.

In *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100, the statute conferred upon an official the power to kill a diseased animal. The inspector found that the horse in question was diseased. Acting pursuant to the statute, he ordered the horse killed. In that case, upon a review of the facts the court held that the horse was not in fact diseased and accordingly concluded that the administrative officer did not have jurisdiction.

In *Pearson* v. *Zehr*, 138 Ill. 48, a judgment against members of a board of live-stock commissioners, because of killing horses which were found not to have glanders was sustained. The court held that unless the animals were suffering from glanders as a fact, the killing was "in excess of jurisdiction" and without authority of law. The decision of such a board may be made conclusive where the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review; it cannot itself conclusively settle that question, and thus endow itself with power. . . . Clear violations of law in reaching the result reached by the board, such as acting without evidence, or making a decision contrary to all the evidence, constitute jurisdictional error and will justify reversal of the board's action." *Borgnis* v. *Falk*,

147 Wis. 327, 359.

The provision in the Act exempting ministers of religion is analogous to the exemption of "street, suburban or interurban electric" railways from the authority of the Interstate Commerce Commission under the Interstate Commerce Act. (41 Stat. 477, 49 U. S. C. Sec. 1 (22))

In *City of Yonkers* v. *United States*, 320 U. S. 685, 689, it was held that a determination of the Interstate Commerce Commission of a request for abandonment of the railroad line was not final and conclusive so as to preclude judicial review on whether the Commission had jurisdiction to enter the order. It was held that the exemption involved a mixed question of fact and law: "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." Cf. *I. C. C.* v. *Inland Waterways Corporation*, 319 U. S. 671, 691.

A similar holding was also made in *United States* v. *Idaho*, 298 U. S. 105, 109. In that case the court said: "Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gagg Bros.* v. *United States*, 280 U. S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." Compare *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 148 F. 2d 473, 478-479.

In the administration of the public land system the courts have repeatedly allowed judicial review of determinations of the Land Department, in instances where it is claimed that the Department did not have jurisdiction because the tract in question was exempt. In *St. Louis*

Smelting & Ref'g Co. v. *Kemp*, 104 U. S. 636, the court said: "If they never were public property or had been previously disposed of, or if Congress had made no provision for their sale or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed."

The courts have set aside determinations of the Department where it was shown that the tract was embraced in the Spanish grant. The court held that such land was never public property and therefore not within the jurisdiction of the Department. *Newhall* v. *Sanger*, 92 U. S. 761; *Doolan* v. *Carr*, 125 U. S. 618.

The finding and order of the Land Department was held to be not final or conclusive against judicial review where by statute the land is reserved from patent. *Wilcox* v. *Jackson*, 13 Pet. 498; *Wisconsin, etc. R. Co.* v. *Forsythe*, 159 U. S. 46; *Noble* v. *Union R. Logging Ry.*, 147 U. S. 165; *Borax Consolidated* v. *Los Angeles*, 296 U. S. 10; *Morton* v. *Nebraska*, 21 Wall. 660.

In *Burfenning* v. *Chicago S. P. Ry.*, 163 U. S. 322, 323, in setting aside an order of the Land Department, this court said: "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell* v. *Benson*, 285 U. S. 22, 54.

In cases concerning validity of administrative orders deporting aliens, this court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judical trial *de novo*. In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), this court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabaudo* v. *Etling,* 287 U. S. 329. The same rule was followed in the earlier case of *Gonzales* v. *Williams,* 192 U. S. 1, 15.

In *Kessler* v. *Strecker,* 307 U. S. 22, 34-35, it was declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho* v. *White,* 259 U. S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 50-52, Chief Justice Hughes said: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence

clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Where the facts are undisputed it is a question of law for the court to decide in determining whether the statute shall be applied to the undisputed evidence before the administrative agency. Determinations of a draft board involving purely questions of law, especially in reference to the extent to which the statute shall be applied, or the meaning of terms used in the statute, are for the final consideration of the courts in the exercise of the judicial function. What does or does not constitute a minister of religion within the meaning of the Selective Training and Service Act of 1940 is a judicial question which is ultimately for the courts to decide. The determination of the draft boards is not conclusive and does not preclude the courts from deciding what constitutes a minister and whether a given state of facts proves a registrant is a minister.

In *Smith* v. *Hitchcock,* 226 U. S. 53, the question for determination by the administrative agency was whether the publication was a book or a magazine within the terms of the statute. While the determination of whether a particular piece of literature is a book or a magazine in the ordinary sense of the words is doubtless a question of fact; yet whether it is to be classified as a book or as a magazine is a question of statutory construction. In that case the court held the question to be one of law and allowed judicial review.

In *Federal Trade Comm'n* v. *Gratz,* 253 U. S. 421, 427,

the court held that what constituted unfair competition methods was a judicial question on which the courts had the final say: "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include."

Whether one who is a native inhabitant of Porto Rico is a citizen of the United States is a question of law to be judicially determined by the courts in spite of the contrary administrative determination by an administrative agency. *Gonzales* v. *Williams,* 192 U. S. 1; cf. *United States* v. *Wong Kim Ark,* 169 U. S. 649.

In *Gegiow* v. *Uhl,* 239 U. S. 3, the immigration officials determined to exclude Russians on the ground that they were likely to become public charges because of mass unemployment at the place where they were destined. This court held that the determination of the administrative agency on such an erroneous theory was a question of law which was not binding on the courts. It was held that the aliens could not be excluded on such ground.

In *American School,* etc., v. *McAnnulty,* 187 U. S. 94, where on the record nothing further was shown against the complainant than that he was engaged in the business of practicing so-called "mental healing", this court reversed a decree which had denied an injunction against the issue of a fraud order, saying that whether or not mental healing was *per se* fraudulent was not a question for the Postmaster-General, and that to sustain such an order it was not sufficient to show opinions which *might* be false, but that a case of "actual fraud in fact" must be made out.

If an error of law has been committed by the administrative agency, including arbitrary and capricious determinations, the court will review the action of the administrative agency. *S. Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251.

In the case of a determination by a draft board upon undisputed evidence that a minister of religion is not

entitled to the exemption he claims, all elements of the decision can be so separated "as to identify a clear-cut mistake of law". *Dobson* v. *Commissioner*, 320 U. S. 489, 502. See, also, *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 286-287.

All the latest decisions of this court clearly demonstrate that the judiciary has unquestionably retained its authority to overrule administrative determinations which are contrary to law. If a draft board commits an error of law, or makes a decision not consonant with the Act and Regulations, an error of law has been committed which requires judicial review. *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Norton* v. *Warner Co.*, 321 U. S. 565; *Equitable Life Assurance Soc'y* v. *Comm'r*, 321 U. S. 560; *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U. S. 194; *Thomson* v. *United States*, 321 U. S. 19; *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31; *United States* v. *Carolina Freight Carriers Corp'n*, 315 U. S. 475.

If the draft boards are to be given exclusive and final authority of saying whether or not ministers of a certain denomination are to be given the exemption allowed by Congress, then the administrative agency is the exclusive judge of the extent of its powers and authority and is clothed with unlimited power to deny due process of law and to defy even Congress. Courts are unanimous in holding that an administrative agency does not have the power to violate the procedural rights of due process of the citizen or other person with whom they deal. Thus if an administrative agency rejects evidence, refuses to give a full and fair hearing, or in any way violates the procedural rights of a person, the courts can intervene—indeed, it is their *duty* under the Constitution to intervene—to review the administrative action. If the courts find that the requirements of procedural due process have been violated, the administrative determination is invalidated. *Bridges* v. *Wixon*, 65 S. Ct. 1443. Cf. *Esquire* v. *Walker*, — U. S. App. D. C. —, — F. 2d —. So also it was held

in cases involving the determination of draft boards: *Arbitman* v. *Woodside* (CCA-4) 258 F. 441; *Ex parte Cohen* (DC-ED-Va) 254 F. 215; *Ex parte Beck* (DC-Mont) 254 F. 967; *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876; *United States ex rel. Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. Reel* v. *Badt* (CCA-2) 141 F. 2d 845; *United States ex rel. Beye* v. *Downer* (CCA-2) 143 F. 2d 125; *United States ex rel. Bayly* v. *Reckord* (DC-Md) 51 F. Supp. 507; *Application of Greenberg* (DC-NJ) 39 F. Supp. 13.*

The Selective Training and Service Act of 1940 provides that determinations of the draft boards subject to the right or appeal to the boards of appeal are final. (54 Stat. 893, 50 U. S. C. Sec. 310 (a) (2)) This is the usual provision limiting judicial review that is to be found in almost every act creating administrative agencies.

The Federal Trade Commission Act provides that the findings of the Commission "shall be conclusive". (52 Stat. 113, 15 U. S. C. Sec. 45 (c)) The Securities Exchange Act provides for conclusiveness of all findings of the Commission supported by evidence. (48 Stat. 901, 15 U. S. C. Sec. 78y (a)) The findings of the Federal Bureau of Internal Revenue (49 Stat. 978, 27 U. S. C. Sec. 204 (h)), the Federal Power Commission (49 Stat. 860, 16 U. S. C. Sec. 8251), the Fair Labor Standards Board (52 Stat. 1065, 29 U. S. C. Sec. 210), the Bituminous Coal Commission (50 Stat. 85, 15 U. S. C. Sec. 836 (b)), and the National Labor Relations Board (49 Stat. 453, 29 U. S. C. Sec. 160 (e)) shall be conclusive if supported by evidence.

Here the finality provision of the Act does not prevent the court from exercising its judicial function of protecting the constitutional rights of registrants and checking the usurpation of authority by the draft boards.

* In the *Estep* case there is presented a situation where the administrative agency denied the procedural rights of due process. This denial of procedural due process, as ground for reversal of the *Estep* judgment of conviction, is thoroughly discussed under point SEVEN, *infra*, pages 194 to 202 of this brief.

In *Employers' Assurance Corp'n* v. *Industrial Accident Comm'n*, 170 Cal. 800, a similar statutory restraint upon judicial review of an administrative agency's determination was considered. There it is said: "Award made by the commission is subject to review and annulment where the finding on any jurisdictional fact is without the support of substantial evidence, and this notwithstanding the provision of the act that the findings of the commission on questions of fact shall be conclusive and final."

The act providing for the issuance of patents by the Land Office contains a provision making the determinations of the Land Office final. In *Johnson* v. *Towsley*, 13 Wall. 72, Justice Miller said: "In the use of the word 'final' we think nothing more was intended than that with the single exception of an appeal to the Secretary of the Interior the decision of the Commissioner of the General Land Office should exclude further inquiry within that department. . . . It is fully conceded that when those officers decide controverted questions of fact in the absence of fraud or imposition or mistake, their decision of those questions is final except as they may be reversed on appeal in that department; but we are not prepared to concede that when in the application of the facts as found by them, they by misconstruction of the laws take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to grant relief."

Even in the various exclusion acts allowing the immigration officers to exclude or deport aliens provision is made that the determination of the executive board shall be final. Nevertheless the courts have accorded judicial review in spite of such finality provisions. *Ng Fung Ho* v. *White*, 259 U. S. 276:

> It is unreasonable to suppose that Congress would provide for exemption of ministers of religion and then tacitly authorize the boards to deny such exemption and thus frustrate the intent of Congress in specifically providing for the exemption.

The finality provisions of the Act here in question were intended by Congress to extend to classifications of persons not exempt. As to exempt persons it was intended to be confined to determinations where there was a disputed question of fact as to the exempt status of the registrant.

Determinations of draft boards are final only insofar as they relate to matters within the jurisdictional discretion of the Selective Service System. A recognition of the exemption of ministers of religion by the draft boards is a ministerial function exclusively and is not a discretionary function unless there is a dispute of fact or a challenge to the truthfulness of the claim for exemption as a minister made by the registrant. This conclusion is supported by the provisions of the Act that all a minister of religion is required to do is to register with the local board, making his identification as a minister known to the local board, so that the board can recognize it and eliminate the registrant from the manpower reserve. (54 Stat. 887, 50 U. S. C. Sec. 305 (d))

Since it is a judicial question to be determined as to whether the minister of a certain denomination comes within the definition of the term "minister of religion", within the meaning of the Act, the finality provisions of the Act do not foreclose review of such question of law. It would be absurd to assume that Congress intended to empower the draft boards with the right to deny a judge, a Congressman, a State governor or a member of a State legislature the deferment provided in the Act by reason of the finality provisions thereof. If the board had the power to deny a Congressman his deferment, then it would have the power to defeat the purposes of the Act in providing for statutory deferments and exemptions. The finality provisions of the Act, therefore, do not confer unlimited, imprescriptible authority upon the administrative agency.

The fact that Congress provided that the boards should have the power to decide all questions of deferment and exemption does not give them an arbitrary power—does

not empower the boards arbitrarily to usurp their functions under the Act.

For instance, a justice of the peace has the right to pass upon a plea to his jurisdiction. The fact that he may decide the plea and overrule it does not confer jurisdiction or authority upon him. If, as a matter of fact, it can be shown, in collateral proceedings, that he did not have jurisdiction, his judgment would be subject to attack in collateral proceedings to enforce it.

The Act conferred upon the determinations of the administrative agency the attribute of finality only to the extent that the powers thus conferred are exercised lawfully. An illegal and unconstitutional exercise of the power conferred by the Act cannot be shielded behind the finality provisions.

In *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, the finality provision of the Selective Training and Service Act of 1940 was considered by the court:

"On this appeal relator . . . presents once again the question of the extent to which courts should review the findings of selective service boards . . . [NOTE 1: Like the present Act the Selective Draft Act of 1917, 50 U. S. C. A. App. s. 204, provided that the decisions of district boards should be 'final' except for the appeal to be provided by presidential regulation.] . . . Undoubtedly the statutory provision that decisions of the selective service boards shall be 'final' narrowly limits the scope of judicial examination of board actions; but it is clear that Congress through use of such words cannot deny any registrant the constitutional protections of due process of law. See *Angelus* v. *Sullivan*, 2 Cir., 246 F. 54, 63 and cases cited therein. Thus it is error reviewable by the courts when it appears that the proceedings conduct by such boards have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act.' *Ibid.*, 246 F. at page 67."

There may be a need to narrow the scope of judicial review of determinations of draft boards in classifying persons not claiming the statutory exemption; that is, those liable for training and service. But as to exempt registrants there is no such need. The question of allocating manpower and filling the needs of draft quotas may be a matter within the peculiar knowledge of the Selective Service System. Certain it is that whether one should be deferred on account of employment in a defense plant, instead of being ordered to report for induction, is something peculiarly within the province of the administrative agency. It is for the Selective Service System to say the number of farmers needed to maintain a properly balanced flow of agricultural products to support the nation, including the armed forces. Also, it is exclusively the prerogative of the Selective Service System to decide how many men should be kept on the home front to maintain industry for producing implements of war. These and thousands of other matters affecting manpower, the size of the armed forces and the needs of the nation, are solely the concern of the Selective Service System. All these matters were left by the Congress within the sole discretion of the Selective Service System. They are matters that are technical.

They properly can be decided only by men skilled in knowledge of the nation's needs in wartime. The judgment of the courts cannot be rightly invoked to substitute for that of the Selective Service System in connection with all classifications that are left by Congress within the discretion of the administrative agency and which are not removed from the authority of the draft board by express exemption embodied in the Act.

However, in the case of exemption of ministers of religion no such exigencies or technical complications are involved. Congress considered all the factors and difficulties that might flow from allowing to ministers exemption from training and service when the provision for their *exemption*

(not deferment) was incorporated in the Act. Hence, it is not for the Selective Service System to say that the exemption shall not be allowed when rightly and not fictitiously *claimed* by a registrant who seeks to avail himself of the statutory provision. The mandate of Congress granting the exemption must be complied with by the administrative agency.

The authority of draft boards in dealing with the exemption of ministers of religion is *ministerial* exclusively and not discretionary in all instances where the duly asserted claim for exemption as a minister is seasonable made. It is only where there is some dispute of fact as to the claim, or an issue as to the credibility of the claim made by the registrant for exemption *as a minister*, that the draft boards have the power to exercise discretion and disallow the claim.

Creation of the Selective Service System, empowered under the 1940 Act to conscript manpower, does not show an intention of Congress that *all* questions stemming from the functioning of that created administrative agency are to be decided finally and exclusively by and within the agency. All the reasons of policy and expeditious action considered by Congress in creating the agency and in vesting with it the discretion of determining classifications affecting manpower, do not show that Congress intended to vest the final determination of the status of exempt registrants solely in the administrative agency. At least on the question of exemption of ministers of religion Congress intended that the administrative determination should not be final.

In many acts creating administrative bodies Congress has given such agencies a broad latitude in making determinations, that are unchallengable in the courts by any person. This is ordinarily due to the fact that such agencies are created to operate in fields that are technical, requiring determinations by learned experts having peculiar knowledge of the techniques pertaining to the respective fields in which such agencies are legislatively assigned to operate.

But even in such cases questions of law and exemption provisions withdrawing certain facts from the authority of a particular agency have always permitted judicial review on such questions.

While the courts may well defer their judgment to the judgment of the draft boards in determinations affecting classification of registrants other than those exempt by express provision of Congress, yet it is clear that Congress did not intend that the determination of whether one is a minister of religion is such a technical subject that it would be left solely in the discretion of the draft boards. Experts are not necessary to determine whether one is or is not a minister. The judges of the courts have the final say on whether a person has no duty for training and service because he is a minister of religion. Members of the draft boards are no better qualified to decide whether or not a man is a minister than is a judge of a court.

It is a known fact that members of the draft boards include neighbors and friends of ordinary laymen in communities where the draft boards sit. Often they are of the "butcher, baker and candlestick-maker" variety. They are not chosen for their knowledge of Holy Writ or of religion and their skill in discerning and determining the qualifications of ministers of religion. Indeed, many members of a draft board may be neither students nor believers of the Bible or of religion. Some may have no knowledge at all on the subjects. They were chosen more for their knowledge of the qualifications, needs and effect of drafting men liable for training and service. It is in this peculiar field that this knowledge is confined. It has been well said that "the comparative obscurity of many so-called expert bodies in state and local administration may well counterbalance any argument that can be drawn from their supposed technical qualifications in favor of allowing them a wide freedom from court control. As matters stand, although these bodies are theoretically composed of experts, the facts are often otherwise. A recent enumeration men-

tions a commissioner of health in an American city who was a harnessmaker; a commissioner of public utilities who was a barber; a commissioner of sanitation who was a house-mover; and another commissioner of health who was an undertaker." Dickinson, *Administrative Justice and the Supremacy of Law* (1927), pp. 262-263.

In consideration of the scope of review to be permitted of draft-board determinations, courts that have had occasion to speak on the subject have not established a uniform rule. Indeed, there is a conflict between the various holdings of the circuit courts of appeals on this question. In *Angelus* v. *Sullivan* (CCA-2) 246 F. 54, the widest scope of review said to be allowed is whether the action of the draft boards "has been without or in excess of their jurisdiction, or . . . so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the Act."

In *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, it was said that judicial review of the classification of registrants and the determinations of draft boards is limited to "whether the local board had any evidence before it to sustain its result." Cf. *United States ex rel. Reel* v. *Badt* (CCA-2) 141 F. 2d 845; *United States ex rel. Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. La Charity* v. *Commanding Officer* (CCA-2) 142 F. 2d 381.

Another circuit court of appeals has held that the scope of review should be limited to whether the draft boards "received and considered what a particular registrant submitted" in the form of evidence. *Stanziali* v. *Paullin* (CCA-3) 138 F. 2d 312. In another decision the same court said that the inquiry was limited to "whether the relator's appeal was fairly heard and determined." *United States* v. *Kinkead* (CCA-3) 250 F. 692. Another circuit court has reached the same conclusion. *Crutchfield* v. *United States* (CCA-9) 142 F. 2d 170, 173-174.

It has also been said that the only question for review by the courts of draft-board determinations is whether the

action of the board is in excess of authority and without jurisdiction; or whether the board failed to give the registrant a fair oportunity to be heard and present his evidence, assuming that the board had jurisdiction. *Franks* v. *Murray* (CCA-8) 248 F. 865. However, this same circuit court has also stated that review of the facts supporting draft-board determinations is confined to whether there is substantial evidence, which is the usual rule of judicial review applied to many administrative agencies. *Johnson* v. *United States* (CCA-8) 126 F. 2d 242; *Seele* v. *United States* (CCA-8) 133 F. 2d 1015, 1021; *Graf* v. *Mallon* (CCA-8) 138 F. 2d 230, 234-235. The same conclusion was reached by another circuit court of appeals: *Arbitman* v. *Woodside* (CCA-4) 258 F. 441. But see *Baxley* v. *United States* (CCA-4) 134 F. 2d 998-999, and *Goff* v. *United States* (CCA-4) 135 F. 2d 610.

Another circuit court of appeals also held that the scope of review was whether there was substantial evidence to support draft-board determinations: *Rase* v. *United States* (CCA-6) 129 F. 2d 204, 207; *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430, 431. But see *Checinski* v. *United States* (CCA-6) 129 F. 2d 461, 462. A similar rule was stated by another circuit court of appeals: *United States* v. *Messersmith* (CCA-7) 138 F. 2d 599.

A more narrow rule, however, has been stated by another circuit court, that review is limited to whether there is any evidence at all to support the findings of the draft boards. *Buttecali* v. *United States* (CCA-5) 130 F. 2d 172.

Whatever may be the rule that is to be applied to review of determinations made by draft boards in the field of administrative deferments and in the classifications of persons not exempt, it is certain that there must be a reasonable and fair scope of judicial review allowed in reference to determinations made concerning ministers of religion exempt from duty under the Act.

To allow a draft-board order demanding a minister to

report for induction to stand on the ground that it is supported by any evidence is to defeat the purpose of Congress in allowing the exemption. If the rule denying review where there is any evidence to sustain the classification is applied, in cases involving bona fide ministers of religion, it must mean that there must be some evidence that the registrant was not a minister. If it means whether there is any evidence that he was of military age and physically acceptable, then the purpose of the exemption provided by Congress is frustrated. Indeed, a minister may be in good health and of military age. That would be some evidence to support the draft-board determination in case of a person liable for training and service. It certainly would not be any evidence to sustain the determination made by a draft board in the case of a registrant who is a minister of religion.

In the judicial review of determinations of draft boards involving persons claiming exemption from training and service under Section 5 (d) of the Act as ministers of religion, it must be confined to whether there was any evidence, or substantial evidence, or some evidence, that the registrant was not a minister. If there was not any evidence that he was not a minister, or if the undisputed evidence showed that he was a minister of a particular denomination, regularly performing the duties of his ministry, the draft-board determination would certainly be without support of any evidence and contrary to law. Certainly Congress did not ever intend, in the creation of an administrative agency, to force the court, in review of administrative authority, to find that the "moon is made of green cheese" because the administrative board says that it is so. *Getty* v. *Williams Silver Co.*, 221 N. Y. 34.

"Admittedly the only power of the boards under the statute is to pass on the question of whether a registrant is in fact a 'regular or duly ordained' minister of religion. If he is, his qualifications so to act are immaterial. *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944.

Judicial review on some fair and honest basis must be allowed to registrants exempt under the Act, who have been wrongly classified by the draft boards, in order to give effect to the Act of Congress. Moreover, it is necessary, in order to protect the citizen from illegal usurpation of authority by the draft boards.

"Under the administrative method, government acts directly as one of the parties to the proceeding, often on its own motion. The controversy thus comes to be one, not between private individuals, but between an individual on one side and government on the other. The defendant has the mobilized force of the organized community against him. For a person in this position our traditional law has always been peculiarly sedulous. The principle has always been that the individual is entitled to the protection of the law against possible governmental aggression. And, although it is true that this principle developed when government was not yet responsible to the community and that such responsibility has been subsequently established, it is needful to remember that even a popular government must operate through fallible human agents, whose action may be arbitrary or prejudiced. The danger is especially great in the case of the petty bureaucrats who wield minor administrative authority. These persons are immune from the light of publicity which beats on the occupants of high office, and are relieved by their sheer obscurity from effective responsibility to public opinion." See Presidential Address of Charles Evans Hughes, *Rep. New York State Bar Ass'n* (1919), xlii, 234 ff.*

"The dangers of oppression by small officeholders are enhanced by another feature of the machinery of administrative justice. Not merely does the citizen find himself

* See, also, "Lawyers Urge Judicial Curbs on Administrative Abuses," Joseph W. Henderson, President, American Bar Association, *American Bar Association Journal*, March 1944, p. 122; "Making Secure the Blessings of Liberty," Annual Address by Joseph W. Henderson, President, American Bar Association, delivered on September 11, 1944, at Chicago, Illinois, *American Bar Association Journal*.

opposed by officials with the whole weight of the public force behind them, but the very officials who are his adversaries are also the judges in the cause. The health board or building inspector, or whatever body or official it may be, that acts as the adjudicating agency, is generally also the complainant in the case. However honest may be the intention of officials under such circumstances, they are humanly actuated by a desire to justify their proceedings. They are not likely to decide against themselves in a proceeding to which they are a party, or to go very deeply into the merits of a case to determine whether or not they should do so. There is an ever valid insight in Coke's dictum that the same persons ought not to be judges and parties in the same cause." Dickinson, *Administrative Justice and the Supremacy of Law* (1927), pp. 252-253.

FIVE

It was reversible error for each trial court to refuse the jury the right to inquire whether or not the action of the administrative agency in denying each petitioner his claim for exemption from training and service was in violation of the Act, the Regulations and the Constitution.

The provision for exemption of "regular or duly ordained ministers of religion" from all training and service appears in the Selective Training and Service Act. (54 Stat. 887, 50 U. S. C. App. 305 (d))

The Selective Service Regulations declare that ministers of religion shall be placed in Class IV-D. Reg. 622.44.

The Regulations define a "regular minister of religion" to be one "who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization, of which he is a member without having been formally ordained . . . ; and who is recognized by such church, sect, or organization as a minister. Reg. 622.44 (b).

A "duly ordained minister of religion" is defined to be "one who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect or religious organization, to teach and preach its doctrine and to administer its rites and ceremonies in public worship; and who customarily performs those duties." Reg. 622.44 (c).

The purpose of the absolute exemption of ministers of religion from all training and service has its genesis in the age-old policy of the government to exempt all works of piety. Charitable, religious and Christian activity has always been exempt from the ordinary burdens of government imposed on the people by law. These exemptions encourage the growth of such beneficent activities. The exemption is not a contribution to such work. It has been provided by the government on the theory of reciprocity. Advantages inure to the government from free and unhampered flow of such activities among the civilian population, especially in wartime. The uplifting influence flowing from these activities among the people contributes greatly to the welfare and life of the nation. Preaching activity of ministers of the gospel sustains the morale of the people in time of war. The sorrows and sufferings of the people as a direct consequence of war are allayed by the comforting message of hope disseminated by preachers of the gospel of God's kingdom.

Preaching activities of ministers of religion bear burdens that would ordinarily fall directly upon the government. Were it not for their eleemosynary work the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper laws. The contribution to the government through the benefits received by the

people from the preaching activity of ministers of religion cannot be equaled by the government if it were to undertake such activity. The charitable work of ministers of the gospel "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure." *Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 192; *M. E. Church South* v. *Hinton,* 92 Tenn. 188, 190, 21 S. W. 321, 322; *People* v. *Barber,* 42 Hun (N. Y.) 27; *Comm'th* v. *Y. M. C. A.,* 116 Ky. 711, 76 S. W. 522.

These same arguments as grounds for exemption of the minister of religion from all training and service in the armed forces were duly considered by the House Committee on Military Affairs at hearings had upon the Burke-Wadsworth bill, H. R. 10132. (Hearings before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Session, July 30, 1940, pp. 299-305, 628-630) When the bill was before Congress, for consideration before passage, members of Congress declared that the exemption was for the purpose of maintaining the institutions of religions during the war and to insure the performance of and to guarantee that the people would receive religious training and guidance during the war. 55 Congressional Record, pp. 963, 1473, 1527.

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and service." *Selective Service in Wartime,* Second Report of Director of Selective Service 1941-42, p. 239.

In speaking of this exemption in *Trainin* v. *Cain* (CCA-2, 1944) 144 F. 2d 944, it was said that ministers were exempted in order to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."

A review of history shows that the nations, from time immemorial, have provided for the exemption of ministers from military training and service. Before the Roman

Empire the nation of Israel conscripted men for military training and service, so that their and the people's free worship of Jehovah God would not be interrupted or affected by the nation's prosecution of war. (Numbers 1:47-54; 2:33) Twenty-three thousand ministers were completely exempted upon the first registration, according to statistics. (Numbers 26:62) Under this system of exemption of ministers of religion from training and service, the effective prosecution of wars was not in the slightest impaired by reason of the large number of exemptions permitted. Indeed, that nation prospered and gained many victories. From that day, throughout history to the present day, all enlightened nations have not hesitated to liberally extend exemptions from all training and service to the ministers of religion preaching and teaching within their borders during the time of war. Only the barbarous heathen and oppressive nations have refused to allow complete exemption from military training and service to ministers of the gospel following in the footsteps of Christ Jesus.

History shows that the early Christians claimed exemption from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral as to war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.*

* Henry C. Sheldon, *History of the Christian Church*, 1894, Crowell & Co., New York, p. 179 *et seq.*; E. R. Appleton, *An Outline of Religion*, 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.*; Capes, *Roman History*, 1888, Scribner's Sons, New York, p. 113 *et seq.*; Willis Mason West, *The Ancient World*, 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.*; Capes, *The Roman Empire of the Second Century*, Scribner's Sons, New York, p. 135 *et seq.*; Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*; Hayes & Moon, *Ancient and Medieval History*, 1929, The Macmillan Company, New York, p. 432; Willis Mason West and Ruth West, *The New World's Foundations in the Old*, 1929, Allyn & Bacon, New York, p. 131; Joseph Reither, *World History at a Glance*, 1942, Garden City Publishing Co., Inc., New York, p. 102; Francis S. Betten, S. J., *The Ancient World*, 1916, Allyn & Bacon, Boston, p. 541.

After the first selective service registration in October 1940 a number of misunderstandings on the part of draft boards concerning the proper classification of Jehovah's witnesses were drawn to the attention of National Headquarters of the Selective Service System. In the early part of 1941 a conference was had between the officers of that National Headquarters and a representative of Jehovah's witnesses regarding the ministerial status of Jehovah's witnesses under the Act and Regulations. Pursuant to the discussion had and the information considered, the National Director of Selective Service, on June 12, 1941, promulgated Opinion No. 14, defining the ministerial status of Jehovah's witnesses.

Jehovah's witnesses and their legal governing body, the Watchtower Bible and Tract Society, Inc., have been duly declared to be a recognized religious organization within the meaning of the Act and Regulations.

The Opinion provided:

"1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect." (Vol. III, Opinion No. 14, National Headquarters, Selective Service System)

The same Opinion provided that full-time ministers of Jehovah's witnesses representing the said Society "come within the purview of Section 5 (d) of the Selective Training and Service Act of 1940 and may be classified in Class IV-D, provided that the names of such persons appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Head-

quarters of the Selective Service System."*

The certified list circulated by National Headquarters did not include all male pioneers, full-time ministers, because at the time of the first registration only the names of individuals between the ages of 21 and 35 were required to be submitted by National Headquarters. Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the certified official list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the person whose name was to be added to the list. Upon the February 1942 Selective Service registration a number of full-time pioneer ministers of Jehovah's witnesses were automatically added to the list because of their having been in the full-time missionary evangelistic work on June 12, 1941, when the first certified official list was promulgated. The reason their names were not on the original certified official list was because they were not of the age bracket then liable for training and service.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of the National Headquarters of the Selective Service System having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that the National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the certified list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the National Director

* Part-time ministers of Jehovah's witnesses and others whose names did not appear on the certified list were eligible to make claims for exemption as ministers of religion, provided that "they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, . . . they perform functions which are normally performed by regular or duly ordained ministers of other religions." ¶ 5, Opinion No. 14, Vol. III, June 12, 1941.

of Selective Service changed the policy regarding the adding of names to the official list, and discontinued the practice of placing new names upon the certified list. On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified list. The Opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other [of] Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The failure of one of Jehovah's witnesses to have his name to appear upon the certified official list circulated by the Director of Selective Service to all State headquarters in the Selective Service System does not militate against his claim for exemption as a minister of religion. It is the

duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official list of pioneer ministers referred to in State Director Advice No. 213-B does not authorize the board to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch* v. *Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards."

In a letter from General Hershey, National Director of Selective Service, dated July 7, 1943, concerning the certified official list, he said, *inter alia*, "The official list of Jehovah's Witnesses is no more than information from National Headquarters as to those members who, within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name on the list may be considered by the draft boards in classifying a registrant, the absence of a person's name from the list is not made the conclusive and exclusive test. The list was established and is maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the Selective Service System and the Watchtower Society to exclude from consideration by boards the exemption claim

of other persons whose names did not appear on such list.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon the certified official list circulated by the National Director to the various State Directors of the Selective Service System. Indeed, the Opinion extends to part-time ministers of Jehovah's witnesses.

On June 7, 1944, Opinion No. 14, as amended, was incorporated in State Director Advice No. 213-B, whereby the predetermination of the ministerial status of Jehovah's witnesses was treated along with that of the Salvation Army, Holy Roman Catholic Church, Church of Christ, Scientist, Jewish Congregations, and others. In that Advice the Director said, *inter alia*:

"3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work.

"4. In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status."

That part of Opinion No. 14 relative to the ministerial status of Jehovah's witnesses remains substantially the same except it was provided that "Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status"; and that "Often the servants to the brethren and the company servants are found to be devoting their lives to a work of ministry to the substantial exclusion of secular employment. In such cases, they may be considered for classification into Class IV-D as ministers of religion."*

* In State Director Advice No. 213-B as amended September 25, 1944, this latter provision was omitted and the requirement that a servant to the brethren or company servant be a full-time minister was eliminated.

The policy establishing the standards of treatment of Jehovah's witnesses by the Selective Service System has not been the same as that established for classification of members of religious organizations engaged in the same or similar work. The stringent requirements invoked for the consideration of classification of Jehovah's witnesses are relaxed or eliminated in the treatment of members of other denominations. For instance, draft boards are authorized to reject and refuse to give consideration to certificates, affidavits and statements in that part of the State Director Advice where it is said that such "are not necessarily conclusive proof of a ministerial status." In dealing with other religious organizations the draft boards are told that "no particular form of document is specified for the presentation of information concerning such status."

The Government has argued that petitioner and all other pioneers of Jehovah's witnesses are mere distributors of books. So also does the court below. (67) It is asserted that they are colporteurs and no more. They then say that by reason of this status such pioneers are not entitled to claim the benefit of the exemption contained in the Act. This is typical of all the Government's arguments. It boils down to this, that Jehovah's witnesses, although a religious organization, are not entitled to have their ministers protected by law, even though the protection is extended to the ministers of all other denominations. Indeed, the Government's argument is inconsistent with the Government's Selective Service policy with reference to other religious organizations which are engaged solely in the business of distributing books. For instance, the colporteurs of the Seventh-Day Adventist organization are not ministers in the sacerdotal sense.*

Seventh-Day Adventist colporteurs are mere "Gospel workers" whose qualifications are claimed to be equal in

*A colporteur is defined to be "one who distributes or sells religious tracts and books." Webster's *New International Dictionary*, Second Edition, page 530.

standing with those who preach the gospel. (White, The Colporteur Evangelist, Mountain View, Calif., 1930) They are not ordained as are Jehovah's witnesses. The colporteurs are not ministers as are Jehovah's witnesses. They merely sell books. They do not conduct home Bible studies. They do not make back-calls; they do not preach before congregations; they do not conduct baptismal ceremonies; they do not participate in the burial of the dead; they do not perform other ceremonies, all of which are performed by Jehovah's witnesses, as will be hereinafter shown in this argument. Nevertheless the liberal policy of the Government has been extended so as to permit these colporteurs of the Seventh-Day Adventist organization to be classified as ministers of religion exempt from all training and service under Section 5 (d) of the Act.

In allowing the colporteurs to be classified as ministers no stringent requirements are invoked for the consideration of their classification as are invoked in the consideration of the claim for exemption by Jehovah's witnesses. Compare the requirements: See State Director Advice 213-B set forth in separately-bound Appendix in this brief.*

Jehovah's witnesses are more than colporteurs. They preach and teach, in addition to merely distributing literature.

The term "regular minister of religion" as used in the Act has been given a very broad definition by the Selective Service System in so far as it applies to most religious organizations and their ministers. "The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves

* State Director Advice 213-B, in predetermining the ministerial status of these Seventh-Day Adventist colporteurs, *inter alia*, says that "even though they are not ordained" they are entitled to be classified as ministers of religion when any such colporteur is "found to be actually engaged in a *bona fide* manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials."

exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's Witnesses, who sell their religious books, and thus extend the Word. It includes lay brothers in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion." *Selective Service in Wartime*, Second Report of the Director of Selective Service 1941-42, Government Printing Office, 1943, p. 241.

The Director of Selective Service has not confined the preaching and teaching to oral sermons from the pulpit or platform. He says that such is not the test. "Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message 'from housetops' or write it 'upon tablets of stone.' He may give his 'sermon on the mount,' heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the Cross. He may carry his message with the gentleness of a Father Damien to the bedside of the leper, or hurl inkwells at the devil with all the crusading vigor of a Luther. But if in saying the word or doing the thing which gives expression to the principle of religion, he conveys to those who 'have ears to hear' and 'eyes to see', the concept of those principles, he both preaches and teaches. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.

"But to be a 'regular minister' of religion he must have dedicated himself to his task to the extent that his time

and energies are devoted to it to the substantial exclusion of other activities and interests." *Selective Service in Wartime*, pp. 240-241.

The record shows that Jehovah's witnesses are regular and duly ordained ministers of religion engaged in preaching the gospel of God's kingdom under the direction of their legal governing body which is recognized as a religious organization.

One does not become a minister of Jehovah's witnesses upon suddenly declaring his intention to preach the gospel. He cannot abandon secular work and take up preaching as one of Jehovah's witnesses without first having received instruction and training for the ministry. He must first be a student, preparing himself for the ministry before he undertakes to act as an ordained minister of Jehovah's witnesses. His period of preparation may vary, depending upon his diligence, aptitude, concentration and previous education. Ordinarily he must attend the study classes in one of the congregational schools established and operated by Jehovah's witnesses to prepare others for the ministry. The schools operated for the purpose of preparing Jehovah's witnesses for the ministry are continuous.

Jehovah's witnesses recognize the seriousness of their covenant obligations to Jehovah to preach the gospel of God's kingdom throughout the whole world as a witness. They are conscious of the fact that the peoples of the nation are confronted with a clear, serious and immediate need of education concerning God's kingdom as a means to escape from everlasting destruction in His battle at Armageddon. They have adopted the quickest and most effective way to reach the people. This is by bringing the message to the people at their homes. They must do good unto their neighbor by sounding the warning and offering to teach and educate them on the Bible. If they fail and refuse thus to warn, teach and preach to the people, and instead keep the message to themselves, they would be guilty of a gross crime. (Ezekiel 33:6) They are obligated

to teach and preach to the people a message of hope and escape from the disaster that is about to befall the world in much the same way as Noah was obligated to teach and preach while preparing the ark. (Hebrews 11:7; Luke 17:26, 27; 2 Peter 2:4, 5) The purpose of the warning is not to threaten the people with destruction. Their desire is to lead all persons of good will to a condition where they can receive the benefits of life everlasting under a government of righteousness, ruled over by Christ Jesus, the invisible King, who will have as His princes the faithful men of old mentioned in Hebrews, chapter 11. (Isaiah 32:1) The benefits of that everlasting government to be established upon this earth will be unlimited prosperity, perfection of mind and body, everlasting life, the privilege of having a home with all material and necessary conveniences and the opportunity of filling the earth by bringing forth children who will never die. "Of the increase of his government and peace there shall be no end." (Isaiah 9:6, 7; 11:5, 9; 25:6-8; 65:2-23; Psalms 67:6, 7; 72:1, 4, 7, 8; Revelation 21:1-4) Jehovah's witnesses declare God's Word, which warns that His battle at Armageddon shall completely destroy all wicked governments and evil supporters of wicked governments off the face of the earth forever, together with their god, Satan the Devil. (Revelation 11:18; 2 Corinthians 4:4) They accept the counsel of Christ Jesus that the end of current wicked conditions on earth in Almighty God's battle at Armageddon will come about in this age and during this generation of people who now live upon earth.—Matthew 24:34.

The emergency that resulted from the total war just ended will be found to be small in comparison to the great international emergency in which all nations and peoples find themselves because of the impending battle of that great day of God Almighty at Armageddon.—Revelation 16:13-16.

Jehovah's witnesses believe that every Christian must be a preacher of righteousness. Living a moral and upright

life is not alone sufficient. More is required. Each Christian must prepare himself for the ministry and regularly preach the gospel in order to be a footstep follower of Christ Jesus. Once having made a consecration to preach the gospel of God's kingdom as a minister following in the footsteps of Christ Jesus, such minister cannot turn aside from his covenant to preach. It is written that covenant-breakers are worthy of death. Since all are "bought with a price", they cannot be the "servants of men". (1 Corinthians 6:20; 1 Timothy 4:6) They must "offer unto the Lord an offering in righteousness" (Malachi 3:3), which is their praise of Jehovah by giving testimony concerning His kingdom, which is done by preaching the gospel from house to house, publicly, and from the platform. In doing this they follow in the footsteps of Christ Jesus.

The method of preaching employed by Jehovah's witnesses is by making house-to-house calls, and regularly conducting home Bible studies, preaching on the streets, delivering public sermons, preaching in the schools and congregations of Jehovah's witnesses, and distributing literature containing explanation of Bible prophecies. In going from house to house and in preaching publicly Jehovah's witnesses are following in the footsteps of Christ Jesus. (Matthew 10:7-14; Revelation 3:20) Moreover, the first ministers of Christ Jesus went from house to house and taught publicly. The apostle Paul says: "I kept back nothing that was profitable unto you, but have shewed you, and have taught you publickly, and from house to house." (Acts 20:20) The minister of Christ Jesus is admonished to follow in His footsteps by preaching from door to door and publicly.

Jehovah's witnesses therefore employ the primitive method of preaching. It is simple.

In the Supreme Court of Australia, in the case of *Adelaide company of Jehovah's witnesses, Inc.* v. *The Commonwealth*, 1943, 67 C. L. R. 116, Mr. Justice Williams said that "Jehovah's witnesses is a religious sect professing

primitive Christian beliefs." Preaching is primitive when it is done like the first Christian minister who was Christ Jesus. His apostles also preached in the same primitive fashion.

More than 70,000,000 people in the United States do not belong to any religious organization. Many other millions do not attend any church, although they nominally belong to one of the religious organizations. These non-churchgoers are not heathen. The preaching activity of Jehovah's witnesses reaches not only these millions of persons who depend almost entirely upon Jehovah's witnesses to bring them spiritual food. Additionally, their preaching activity from door to door reaches millions of people who belong to religious organizations but who sigh and cry because of the abominations committed therein. (Ezekiel 9:4; Isaiah 61:1-3) Jehovah's witnesses have answered the need of these people by bringing them printed sermons at their homes, which meets their convenience. It is just as important to have primitive ministers and evangelists going from door to door to maintain the morale of these millions as it is to preserve the morale of those who attend some recognized religious organization's church services. How would these persons who do not attend any church be comforted in their sorrow and obtain spiritual sustenance unless some missionary evangelist brought it to them at their homes. Few, if any, of the orthodox religious clergy call upon the people from door to door. They have their established congregation. They expect the people to come to their church edifices to receive what instruction they have to offer. Accordingly, these millions of persons would starve for want of spiritual food were it not for Jehovah's witnesses who bring Bible instruction to them in their homes. Thus Jehovah's witnesses locate the people of good-will toward Almighty God. If they desire further aid in the study of the Bible Jehovah's witnesses establish Bible studies in their homes. In this way Jehovah's witnesses educate the people in the way of life and point them to

the avenue of escape from the greatest crisis yet known.

Jehovah's witnesses are an international group of missionary evangelists who get their name from Almighty God, whose name alone is Jehovah. (Psalm 83: 18; Isaiah 43: 10-12) Their preaching duties are to call from door to door, presenting Bible literature explaining about God's kingdom described in the Bible as the only hope of the world. The whole earth is divided into countries, each country is divided into divisions, each division and city are divided into areas, each area is assigned to one or more missionary evangelists of Jehovah's witnesses. The ones assigned to each area have a duty to preach from door to door in that area. Persons interested are called back on, for the purpose of establishing regular home Bible studies, which are conducted for a year or more. This is done in order that all such persons may get a complete understanding of the things that the Bible clearly teaches concerning God's kingdom and their relationship to Jehovah and His Kingdom by Christ Jesus.

In addition to this method of preaching Jehovah's witnesses also preach on the street corners by distributing Bible literature. They also deliver public lectures and sermons in various buildings engaged by them for that purpose. Primarily the congregations of Jehovah's witnesses are in the homes of the people. Their pulpits may well be said to be at the doorstep of the home of every person of good-will throughout the nation.

It is not necessary to know theology, philosophy, art, science and ancient classic languages to preach the gospel. One is not required to wear a distinctive garb, live in a parsonage, ride in an expensive automobile, have a costly edifice in which to preach, and command a high salary, to qualify as a minister of Jehovah God. Jehovah's witnesses emulate their Leader, Christ Jesus, and His apostles, rather than the ancient or modern scribes and Pharisees. Instead of a program of choir and organ music followed by discourse on science and philosophy of men, Jehovah's wit-

nesses devote all their time to studying and teaching the Bible and carrying God's message to the people at their homes. They are ministers in the real and true sense and serve all the people. Paul, the apostle, said that the true minister teaches publicly and from house to house. (Acts 20:20; Luke 22:24-27) It is written that Christ Jesus "went around about the villages, teaching" and "preaching the gospel of the kindgom". (Mark 6:6; Matthew 9:35; Luke 8:1) The apostle Peter advises each minister of Jehovah God: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, that ye should follow his steps." (1 Peter 2:21) Jesus expressly commanded His twelve ordained ministers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand." (Matthew 10:7, 10-14) In the four Gospel acounts of the ministry of Jesus, the words "house" and "home" appear more than 130 times, and in the majority of those times it is in connection with the preaching activity of Jesus, the great Exemplar. His example of carrying the gospel message to the people at their homes and in the public ways was "true worship". He said: "But the hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth: for the Father seeketh such to worship him. God is a Spirit: and they that worship him must worship him in spirit and in truth." (John 4:23, 24) His apostle James further describes such worship by ministers of Almighty God at James 1:27, "For the worship that is pure and holy before God the Father is this: to visit the fatherless and the widows in their affliction, and that one keep himself unspotted from the world." (Syriac New Testament, Murdock's Translation)

Each of Jehovah's witnesses is a minister. If he is not a preacher he is not one of Jehovah's witnesses. A person is not a minister because he claims to be such. He is one because he is in fact preaching. If a person is duly trained, prepared and ordained for the ministry, and regularly preaches, teaches, conducts Bible services and performs the

duties of his organization, then he is a minister. The work done by such a minister of Jehovah's witnesses cannot be done by a lay worker. Such work requires the training, learning, skill, which is given only to ministers, evangelists and missionaries who are footstep followers of Christ Jesus. Persons not ministers, except those preparing for the ministry, are not authorized to engage in such preaching activity. Accordingly, it cannot be said that the work is that of a lay church worker. It is exclusively evangelistic, missionary work that requires training of a minister. Can it be suggested that the apostles were mere lay workers because they went from house to house? It may be argued that they were not ministers of the gospel because they were footstep followers of Christ Jesus, employing the primitive method of preaching. The mere asking of the question resounds the answer. Of course it could not be argued that the apostles were not ministers. If they were ministers, by force of the same reason their modern-day counterparts, Jehovah's witnesses, must be considered as ministers.

It has been argued, because each one of Jehovah's witnesses is a minister, that such is unreasonable. The Government and the courts which have indulged in this argument do not make a valid parallel in comparing the making of such a claim by the orthodox churches where there are clergy and laity. Of course, for such orthodox religious organizations it would be unreasonable to say that the laity who do not preach are ministers, the same as the priest or preacher who is the shepherd of the congregation. Such form of activity and religious worship is not that of Jehovah's witnesses. The courts and the Government cannot apply the orthodox yardstick to Jehovah's witnesses. They cannot be measured by it. There is no comparison between the method employed by Jehovah's witnesses and the methods indulged in by the clergy of the orthodox religious denominations. Practices of the orthodox religious groups that are in the majority cannot be used as a gauge for considering a dissentient or altogether differ-

ently constructed organization such as Jehovah's witnesses. To use such comparison is discriminatory. It deprives Jehovah's witnesses of their right to be considered according to the peculiar circumstances relating to their organization, which is entirely different from all others.

The clergy of the orthodox religions have their church buildings and edifices. Members of their congregations come there to hear them preach. Members of the congregations are not authorized or ordained to preach. They are the flock.

Jehovah's witnesses gather at their meeting places as a conference of missionary evangelists. Each one assembled is a consecrated evangelist and missionary. All discuss in conference, at such meetings, ways and means of bettering their preaching as missionaries from door to door. Their "flock" and the members of their congregation do not ordinarily attend their meeting places. Such missionary evangelists go forth as did Christ Jesus and His apostles, from house to house and upon highways and byways and there deliver their message to the people. At such places thousands of persons receive spiritual instruction from those ministers as a result of the missionary evangelistic activity of Jehovah's witnesses.

Jehovah's witnesses are a society of missionary evangelists, ministers of religion, all of whom discharge their responsibility by preaching the gospel of God's kingdom as did Christ Jesus and the apostles. It is not unusual to hear of a society of ministers. Indeed there are such among some of the orthodox religious denominations. The Society of Jesus (Jesuits) is an illustration of a society of ministers. Each member is an ordained priest. No person can become a member of that organization without having first become a Roman Catholic priest. According to the comparison and analogy of the Government and some of the courts that have considered the question, the Jesuits could not be classified as ministers because they belong to a society or organization where all the members are ministers.

In various Catholic missionary societies, the Baptist Home Missionary Society, and other missionary societies of the orthodox religious denominations, each missionary and evangelist is a minister. No one can be a member of such missionary society unless he is a missionary evangelist. Each must be a minister. In such organizations they do not have the clergy and laity class distinction. Indeed, such missionary societies operate on the same principle as do Jehovah's witnesses. Each of such missionary evangelists goes from place to place, from house to house, in missionary fields of foreign countries, and preaches the tenets, traditions and precepts of his particular religion. Jehovah's witnesses engaged in the same sort of activity function in the same sort of way not only in foreign fields but also on the home front. Such missionary societies depend for their support and sustenance upon the people whom they serve in the homes. Their congregations are located in the homes of the people. So also are the congregations of Jehovah's witnesses located in the homes of the people.

Indeed, before modern days Christian congregations were composed entirely of ministers. The first Christian church, located at Jerusalem, was composed exclusively of the apostles and disciples. They studied under Jesus. They followed in his footsteps by preaching publicly and from house to house. Later others studied under the apostles of Jesus. At one time in Jerusalem there were five hundred Christian missionary evangelists, otherwise known as apostles and disciples. There is no record that any clergy-and-laity class distinctions were made in that congregation. Rather, each member of that group was required to participate in the missionary work by evangelizing the people from house to house, as commanded by Christ Jesus. When such early church at Jerusalem met it was as a conference of ministers to discuss ways and means of preaching. Their gatherings, like those held today by Jehovah's witnesses, were those of a congress or congregation of ministers to consider organization instructions and to dispose of inter-

ests common to all. They did not gather as a number of laymen gather in a church edifice to listen to sermons by a minister.

It is conceded that Jehovah's witnesses are a religious organization within the meaning of the Act. The Selective Service System has so found. That cannot be denied. The Government is asking the court to say that even conceding such fact, Jehovah's witnesses are not entitled to have ministers. The Government attempts to cajole the court into denying the legal rights of Jehovah's witnesses because of their dissentient, unorthodox and primitive method of preaching. While the Government's attorneys and the judges of the courts may possibly consider such primitive method of preaching as entirely unsatisfactory to their private beliefs, such is not the issue. Since Jehovah's witnesses are a recognized religious denomination, it must be admitted that they are entitled to have some ministers. It is for Jehovah's witnesses to decide who their ministers are. As long as such ministers are actually teaching and preaching according to the legal governing body of Jehovah's witnesses, it is not for the courts to say that such is an improper method of preaching. Moreover, the courts cannot say that a minister, duly recognized by his organization, is not a minister because he does not preach in the same way that the preacher serving the judges called upon to make the decision preaches. It has been seen that Jehovah's witnesses preach in the same way that the clergy preach. That is, they preach from pulpits and from platforms regularly. However, they do more than what the clergy do. In addition to pulpit preaching they engage in evangelistic work of calling from house to house. Also, they serve the people in their homes by conducting missionary home Bible studies. They perform other functions in discharge of their duties, such as conducting Memorial services, performing baptismal ceremonies, and burying the dead. In the performance of all these duties Jehovah's witnesses act as ministers. They do not work as lay workers.

There is no laity among Jehovah's witnesses. The "laity", in so far as Jehovah's witnesses are concerned, are the people of good will who are to be found in the homes.

The fact that Jehovah's witnesses come from all strata of humanity is immaterial. The best secular background of a minister of Jehovah's witnesses has nothing whatever to do with whether or not he is actually teaching and preaching as a minister of the gospel. Whether a man has previously been a carpenter or a fisherman matters not. If he has satisfactorily completed a course of study in the Bible and Bible helps prescribed by the governing body of Jehovah's witnesses and has established his qualifications, that should be sufficient and conclusive upon the executive and judicial branch of the Government. The only relevancy that a man's background may have to his qualification to act as a minister is upon the issue of whether he is fictitiously claiming to be a minister, and falsely pretends to possess the necessary qualifications.

Should Government's argument that the secular background of Jehovah's witnesses be considered as ground for denying their claim for exemption as ministers of religion, then a dangerous precedent will have been established if adopted by the courts. Indeed, Christ Jesus himself and His apostle Peter could be denied ministerial status because of their background in secular work. Christ Jesus spent several years working as a carpenter. His apostle Peter was a fisherman. Indeed, Peter pursued that avocation for years after he became an apostle of Christ Jesus, in order to support his family. Peter was a married man and had a family. The apostle Paul was a single person and had no responsibilities to support others. This enabled him to engage in the service as a minister full time. If the Government's contention is drawn to its logical conclusion, then even the vice-president, members of Congress, members of State legislatures and judges could be denied their claim for deferment under the Act, because of their background previous to their election to office.

The youthfulness of any of Jehovah's witnesses, as petitioner's when he began his ministry, does not affect his qualifications when he files his questionnaire. The history of his preaching at an early age is not unusual to true followers of Christ. His Christian parents brought him up "in the nurture and admonition of the Lord" and put him into the "temple service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at Deuteronomy 6:4-7. See Ephesians 6:1-4: "Childen, obey your parents in the Lord: for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19.

Timothy was ordained to preach as a disciple when but a small boy. (Acts 16:1-3) Paul, the apostle, wrote this "son of faith" thus: "Let no man despise thy youth; but be thou an example of the believers, in word, in conversation [conduct], in charity [love], in spirit, in faith, in purity." —1 Timothy 4:12; 2 Timothy 3:15; 1 Corinthians 4:17, *American Standard Version.*

Samuel, the prophet, was consecrated for service in the temple when very small and of tender age.—1 Samuel 1:24; 2:11, 23.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God." (Luke 18:16; see also Matthew 18:1-6) Psalm 8:2: "Out of the mouth of babes and sucklings hast thou ordained strength"; Psalm 148:12, 13: "Both young men, and maidens; old men, and children: let them praise the name of the Lord: for his name alone is excellent; his glory is above the earth and heaven." (Proverbs 8:32)

Regardless of the age at which the petitioner began his ministry, there is nothing to show that he was disqualified to act as a minister of Almighty God at the time of his classification and, as such, was and is entitled to complete exemption.

Moreover, the fact that one may be of military age and in good health has nothing to do with his liability for training and service if the evidence shows that he is engaged in the performance of his duties as a minister of religion. Every person knows that even a peg-legged man can be a duly qualified and acting minister of religion. Therefore the physical condition of the registrant is entirely irrelevant and immaterial to the issues to be decided by this court.

The activity of Jehovah's witnesses has been considered by a number of courts. Those courts have found that the work of Jehovah's witnesses is religious within the meaning of the constitutions and statutes applicable. Moreover, it has been found that in the performance of this work Jehovah's witnesses act as missionary evangelists or ministers of religion.

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, the court found that the "petitioners are 'Jehovah's witnesses'. . . . Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching 'publickly, and from house to house.' Acts 20: 20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16: 15. . . . The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations

to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. . . . We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. . . . But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. . . . It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. . . . Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy."

In *Follett* v. *McCormick*, 321 U. S. 573, the court said that the appellant was one of Jehovah's witnesses "and has been certified by the Watch Tower Bible & Tract Society as 'an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus.' . . . We must accordingly accept as *bona fide* appellant's assertion that he was 'preaching the gospel' by going 'from house to house presenting the gospel of the kingdom in printed form.' Thus we have quite a different case from that of a merchant who sells books at a stand or on the road. The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional. . . . But

if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. . . . He who makes a profession of evangelism is not in a less preferred position than the casual worker."

In *Commonwealth* v. *Akmakjian,* 316 Mass. 97, 55 N. E. 2d 6, the Massachusetts Supreme Judicial Court said: "We are of opinion that the case is largely governed in principle by *Commonwealth* v. *Richardson,* 313 Mass. 632, 638, in which we said, in part, that ordained ministers of Jehovah's witnesses who were going from house to house to spread the teachings of their religious faith could not be found properly to come within the category of 'peddlers or agents or canvassers,' and that it had 'been held in may cases [citing authorities] that ordinances regulating the conduct of such persons cannot be extended to cover the activities of ministers who go about on the streets or from house to house preaching or distributing or selling literature relating to their faith.'"

In *Semansky* v. *Stark,* 196 La. 307, 199 S. 129, the Louisiana Supreme Court found that the "plaintiff was . . . disseminating the doctrines of the religious sect of which he was a member and a minister." That Louisiana court, in reviewing its holding, in *Shreveport* v. *Teague* (200 La. 679, 8 S. 2d 640), said: "On the contrary, a reading of the opinion will disclose that we found that the mere fact that the plaintiff, an itinerant preacher, was selling literature fostering the doctrines he was professing, did not make him a peddler as defined by the license tax law. The same deduction is applicable to the case at bar. The fact that the relator preaches his religious views from house to house and distributes literature in support of his beliefs, for which he obtains contributions, does not render him amenable to the provisions of an ordinance which forbids the visitation (without request) in and upon private residences by solicitors, peddlers, etc., for the purpose of

soliciting orders for the sale of goods or for disposing of or peddling the same."

In *Shreveport* v. *Teague*, supra, the court found that Teague was "an ordained minister of a religious sect known as 'Jehovah's witnesses' and is a member of an organization called the 'Watch Tower Bible and Tract Society'. . . . He is admittedly an ordained minister of a religious sect, who, instead of voicing his views from a pulpit, travels as an itinerant preacher from house to house. The fact that relator, as an incident to his preachings, attempts to sell literature which is conformable with his religious beliefs does not alter the nature of his profession or make him a solicitor, hawker or itinerant merchant."

In *Thomas* v. *Atlanta*, 59 Ga. App. 520, 1 S. E. 2d 598, the Georgia Court of Appeals, in reversing the conviction of one of Jehovah's witnesses, said that it was not "the duty of an ordained minister of the Gospel to register his business with the City. Neither is it peddling for such minister to go into homes and play a victrola, or to preach therein or to sell or distribute literature dealing with his faith if the owner of such home does not object. The preaching and teaching of a minister of a religious sect is not such a business as may be required to register and obtain and pay for a license so to do."

In *State* v. *Meredith*, 197 S. C. 351, 15 S. E. 2d 678, the South Carolina Supreme Court said that Meredith was one of Jehovah's witnesses and that he was "a minister of the Gospel, and if the party solicited was interested, he offered for sale one or more of the books and pamphlets referred to. . . . The testimony shows that the main and primary purpose and occupation of the defendant was to preach and teach principles drawn from the Bible, in accordance with his faith, wherever one or two were gathered together and would listen to him. . . . And in our opinion it is not peddling, as that word is usually construed, nor a violation of the statute, for a minister, under the circumstances shown here, to visit the homes of the people, absent objection,

and as a part of his preaching and teaching to offer to sell or sell religious literature explanatory of his faith, where no profit motive is involved."

The United States District Court for the District of Colorado, in *Donley* v. *Colorado Springs* (40 F. Supp. 15), in granting an injunction held that Jehovah's witnesses were entitled to relief, *inter alia*, because "the plaintiff, a minister of the Gospel, is not within the definition of the ordinance."

The Government may argue that these findings and holdings of these courts are not controlling in determining here whether Jehovah's witnesses are ministers of religion. To accept such an argument would be to split hairs and render a distinction without a difference. The activity of Jehovah's witnesses described in those opinions was the basis for the conclusion in such decisions that Jehovah's witnesses were ordained or regular ministers of the Gospel. The precise activity is under review here. The similar conclusion, that Jehovah's witnesses are ministers of religion here, should be unescapable.

Several courts have had occasion to pass upon the question of whether Jehovah's witnesses constitute ministers of religion within the meaning of Section 5 (d) of the Act. In so far as the particular witness of Jehovah making the claims in decided cases is concerned, the courts have ruled that such registrants did not come within the exemption of Section 5 (d) of the Act and Regulations thereunder.*

However, in these decisions certain derogatory remarks are made concerning Jehovah's witnesses, which

* *United States* v. *Messersmith* (CCA-7) 138 F. 2d 599; *Rase* v. *United States* (CCA-6) 129 F. 2d 204; *Buttecali* v. *United States* (CCA-5) 130 F. 2d 172; *United States ex rel. Altieri* v. *Flint* (D. C. Conn.) 54 F. S. 889, affirmed 142 F. 2d 62 (CCA 2); *Ex parte Stewart* (D. C. Cal.) 47 F. S. 415; *Ex parte Yost,* (D. C. Cal.) 55 F. S. 768; *United States ex rel. Lawrence* v. *Commanding Officer* (D. C. Neb.) 58 F. S. 933; *Seele* v. *United States,* (CCA 8) 133 F. 2d 1015.

clearly indicate that these courts considering the activity of Jehovah's witnesses have judged their claim for exemption by comparing the activity to the preaching done by the clergy of the orthodox religious organizations. These courts have erred in viewing the activity of Jehovah's witnesses through the eyes of the orthodox clergy. If the courts, in deciding these cases, had looked at Jehovah's witnesses and their activity through the clear, uncolored glasses of the law, they would have seen that Jehovah's witnesses are preaching the gospel as much as, if not more than, are the clergy of the orthodox denominations and are entitled to the same consideration at the hands of the Selective Service System.

These courts have judged Jehovah's witnesses according to the standards of the orthodox religious denominations that have rigid creeds, ecclesiastical laws and traditional canons. These courts should not have compared the record made in these cases with the background of the personal religious experience of the judges of the courts that made the activity of Jehovah's witnesses appear exotic. If the courts had employed a realistic approach they would have been driven to the conclusion that Jehovah's witnesses constitute a religious denomination and that their ministers are actually preaching, and thus come within the exemption intended by Congress to extend to all religious organizations.

Moreover, these courts, in the decisions rendered where these erroneous conclusions were reached, considered only tangentially the question of whether Jehovah's witnesses were entitled to claim the exemption. Most of those decisions did not require the court to pass upon the merit of the claim made before the draft boards by Jehovah's witnesses. In most of said opinions the courts decided the appeals in the criminal cases adversely to Jehovah's witnesses, holding that they were not entitled to challenge the legality of the classification given them because they had not exhausted their administrative remedies by report-

ing for induction. Accordingly, the discussion in those opinions, as to whether Jehovah's witnesses are ministers under the Act and Regulations, was wholly unnecessary to the decision made in each of those cases. Such discussions were *dicta*.

The exemptions provided for in the constitutions and the various statutes considered by the courts in the foregoing opinions were given a liberal interpretation. The words and spirit of Section 5 (d) of the Act require that they, too, should be given a liberal interpretation, so as to bring Jehovah's witnesses within the exemption provided for in the Act.

There is nothing in the Act to show that Congress intended to not permit as broad a construction to be placed upon the exemption in the Act as has been placed on the 'freedom of religion' clause of the Constitution. Reason and fairness would dictate that if Jehovah's witnesses are preaching as ministers of religion so as to entitle them to the protection of the First Amendment, by force of the same reasoning they are ministers of religion preaching the gospel and thus entitled to the exemption provided for in Section 5 (d) of the Act.

The only court that has directly considered the issue of whether a full-time pioneer missionary evangelist of Jehovah's witnesses is entitled to the exemption as a minister of religion provided for in the Act is the United States District Court for the Northern District of Indiana. That court, in *Hull* v. *Stalter*, 61 F. Supp. 732 (decided February 9, 1945), found that the undisputed evidence showed that the petitioner was engaged in preaching the gospel full time as a pioneer missionary evangelist of Jehovah's witnesses. The court declared that the action of the board in rejecting Hull's claim was illegal. The court said: "Applying the test, which I believe is required, to the case at hand and in the light of the foregoing observations, it is my conclusion that there was no evidence before the Draft Board (that is, neither the Local nor the Appeal

Board) on which to deny the petitioner's claim that he be given a IV-D classification."

Jehovah's witnesses have been ordained as ministers to preach the gospel. The ordination is in accordance with the regulations of the legal governing body of Jehovah's witnesses. They are ordained; therefore ordained ministers of religion within the meaning of the Act and Regulations. The Selective Service Regulations declare that one who has been ordained according to the practice of a recognized religious organization "to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties" is a duly ordained minister of religion within the meaning of Section 5 (d) of the Act. Reg. 622.44 (c).

The Director of Selective Service has declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime,* Second Report of the Director of Selective Service 1941-42, p. 240.

It has been held that the term "ordained minister", as used in the statute licensing ministers to solemnize marriage ceremonies, "has no regard to any particular form of administering the rite or any special form of ceremony. . . . It has been the practice of this court, therefore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the court that they have been duly appointed or recognized in the manner required by the regulations of their

respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies." *In re Reinhart*, 9 Ohio Dec. 441, 445.

The word "ordain" (*ordained*) means "to establish by appointment", "to appoint or establish." Webster's *New International Dictionary;* Funk & Wagnalls *Practical Standard Dictionary.*

The Encyclopedia Americana (1942 Ed., Vol. 20, p. 770) defines ordination as "The ceremony by which priests, deacons, subdeacons, candidates for the minor orders and ministers of any denomination are admitted to their specific office in the church." See also *The Encyclopædia Britannica* (11th Ed., Vol. 28, p. 527 *et seq.*).

The Cyclopedia of Biblical, Theological and Ecclesiastical Literature * defines ordination as "the ceremony by which an individual is set apart to an order or office of the Christian ministry. . . . In a broader, and in fact its only important sense, . . . the appointment or designation of a person to a ministerial office, whether with or without attendant ceremonies. The term ordination is derived directly from the Latin *ordinatio,* signifying, with reference to things or affairs, a setting in order, an establishment, an edict, and with reference to men, an appointment to office. . . . A scriptural investigation of this subject can hardly fail to impress any ingenuous mind with the great significance of the fact that neither the Lord Jesus Christ nor any of his disciples gave specific commands or declaration in reference to ordination."

The system of ordination, according to the doctrine of apostolic succession, was practiced by the Roman Catholic Hierarchy from about the tenth century. It was fully restated by the *Council of Trent* as well as in the formularies of the Roman pontifical, the characteristics of which are: (1) that clerical orders constitute a sacrament; (2) that

* Vol. VII, p. 411 (McClintock and Strong, 1877, Harper & Brothers, New York).

seven clerical orders (exclusive of seven grades of bishops, of which the pope is supreme) are those of priest, deacon, subdeacon, acolyth; exorcist, reader, and porter; (3) that bishops only are competent to confer ordination; (4) that the effect of ordination is to impress on the recipient an indelible mark; (5) that the priest has authority to offer sacrifice for living and dead. In passing, it must be noticed that the Roman Catholic Hierarchy ordains its ministers several times. An individual is ordained when he becomes a priest and each time he is elevated to a higher office, such as bishop, archbishop and cardinal. *Op. cit.;* see *Encyclopedia Americana,* 1942 Ed., Vol. 2, p. 70; *The Catholic Encyclopedia* (1911, Robert Appleton Company, New York) Vol. 11, p. 279 *et seq.*

The above stated theory of ordination had universal prevalence throughout "Christendom" from the sixth to the sixteenth century. A prominent factor of the Reformation was a violent reaction against the dogmas and abuses of the Roman Catholic *system* of ordination. Without exception Protestants rejected the "five sacraments" of the Roman Catholic Church as fictitious. Almost all such churches forsook those ordination *ceremonies* during the Reformation and fell back on the Scriptural precedent as their sole guide for modes of appointing and ordaining ministers.*

Among the independents and Baptists the power of ordination is considered to adhere to any given congregation of believers. The qualifications of a candidate are first ascertained and he is approved by a church, called and accepted. The congregation proceeds to confer ordination upon him by prayer. *Op. cit.,* p. 417.

This same broad and liberal interpretation of the term "ordained minister" as it relates to exemption of a minister

* McClintock and Strong, *Cyclopedia of Biblical, Theological and Ecclesiastical Literature,* Vol. VII, p. 417: "A partial exception has to be stated in reference to the Church of England, which retained a portion of the Roman ritual of ordination." The Director of Selective Service does not consider that ordination direct from God is sufficient to base decisive action. *Selective Service in Wartime,* p. 240.

of a religious denomination under the National Selective Service Mobilization Regulations of Canada has been considered by Mr. Justice McLean of the Supreme Court of Saskatchewan in the case of *Bien* v. *Cooke,* 1944 1 W. W. R. 237. In that case he said: "Although the whole congregation is very indefinite considered from a secular point of view and they appear to be without any prescribed procedure in the matter of ordaining the minister, yet various denominations use various forms of ordination and if the procedure is satisfactory to the congregation, as appears to be in this instance, that should be considered sufficient form of ordination."

With the exception of the Roman Catholic Church and the Church of England, the term "ordained minister" means an *appointed minister* and is not confined to any particular kind of ceremony or formalism. Many groups, such as the Society of Friends, Disciples of Christ, Plymouth Brethren and Jehovah's witnesses do not recognize any human right of ordination. They recognize the ordination as coming only from Almighty God Jehovah. This may be recognized and certified by men. Man-made institutions and legal corporations that act as governing bodies of such may *declare one to be* duly ordained, and issue credentials of authority or ordination. The *ordination* proceeds only from Jehovah God and His Son, Christ Jesus.

Compare the history of the method of ordination in the following churches: Baptist, Congregationalist, Methodist, Disciples of Christ, Society of Friends (Quakers), Lutheran, Presbyterian.*

* Sanford, *A Concise Cyclopedia of Religious Knowledge*, 1895, Funk and Wagnalls Co., New York, pp. 81 *et seq.*; 207 *et seq.*; 254 *et seq.*; 348 *et seq.*; 545 *et seq.*; 593 *et seq.*; 682 *et seq.*; 756 *et seq.*; Simpson, *Cyclopaedia of Methodism*, 1876, Louis H. Everts, Philadelphia, p. 681 *et seq.*; *The Catholic Encyclopedia*, Vol. 10, p. 237 *et seq.* This vast difference in ceremonies of ordination is recognized as existing today by the Director. No set form of ceremony has been established by the Selective Service System. The Director says: "The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime*, supra.

The ordination of Jehovah's witnesses emanates from the Most High God "whose name alone is Jehovah". (Psalm 83:18; Isaiah 61:1-3) He is the Source of all power and authority and the One who authorizes ordination of His ministers. The ceremony used by Jehovah's witnesses to establish by public witness the ordination of a minister is identical with the ceremony that Christ Jesus underwent after He was ordained. A very simple ceremony marked the beginning of His ministry. He symbolized His consecration by undergoing the ceremony of water baptism in the river Jordan. (Matthew 3:13-17) It is this same simple ceremony that every one of Jehovah's witnesses goes through as a public symbolizing of his consecration to preach and of his ordination. No other ceremony is prescribed. After His ordination ceremony by baptism in the river Jordan, Christ Jesus publicly stated the Source of His ordination by quoting from Isaiah 61:1, 2. He said: "The Spirit of the Lord is upon me, because he hath anointed me to preach the gospel to the poor; he hath sent me to heal the brokenhearted, to preach deliverance to the captives, and recovering of sight to the blind, to set at liberty them that are bruised, to preach the acceptable year of the Lord. . . . This day is this scripture fullfilled in your ears."—Luke 4:18-21.

Jehovah's witnesses likewise rely upon Isaiah 61:1, 2 as an expression of the Source of their authority and ordination. In addition to the baptismal ceremony, which is evidence of the heavenly ordination, Jehovah's witnesses also possess credentials of ordination issued by the Watchtower Bible and Tract Society, certifying that they are ordained

ministers of the gospel. This certificate is printed.* It is the method used and accepted by Jehovah's witnesses to evidence their ordination. The card is signed by the Watchtower Bible and Tract Society acting through its president. It is also countersigned by the minister. In addition to that certificate of ordination, full-time missionary evangelists are issued a letter of ordination by the Watchtower Bible and Tract Society, subscribed by the superintendent of evangelists before a notary public, certifying that such pioneer minister is a duly authorized minister of the gospel and authorized to represent the society as such.

It is not necessary for one to go to an orthodox religious seminary or parochial school as a condition precedent to becoming an ordained minister of the gospel. Christ Jesus did not go to such institution. He had been brought up in the "nurture and admonition of the Lord" (Ephesians 6:4) by his parents, who instructed him. He prepared himself for the ministry by continual study of the written Word of God and training while he was carpentering. So, too, today the ministers of Jehovah's witnesses prepare themselves by home Bible study and through instructions received at the divinity schools conducted by Jehovah's witnesses in connection with the congregations, where Jehovah's witnesses and students preparing themselves for the ministry attend regularly.

* Pertinent parts of the certificate are as follows: "This is to certify that ——— whose signature appears below, is an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and that said person is one of Jehovah's witnesses. . . . Jehovah's witnesses are ordained and commissioned by God, and the signer of this card Scripturally claims such ordination and commission, as set forth in the Bible at Isaiah 61: 1, 2; Isaiah 43: 9-12; Matthew 10: 7-12; Matthew 24: 14; Acts 20: 20; 1 Peter 2: 21; 1 Corinthians 9: 16. . . . Jehovah's witnesses, in obedience to God's commandments, preach the gospel and worship Almighty God by calling upon people at their homes, exhibiting to them the message of the gospel of said Kingdom in printed form. . . . The Society of its appointed representatives will be pleased to furnish authoritative proof as to whether the signer of this card is one of Jehovah's witnesses.

WATCH TOWER BIBLE & TRACT SOCIETY
By N. H. Knorr, President"

The submission to the ordination ceremony of public immersion in water brands the minister of Jehovah's witnesses. It marks him as a person who has dedicated his entire life to the service of Jehovah God as a minister, bound to preach the gospel of God's kingdom as long as he lives prior to Armageddon. His ordination implies the acceptance of the obligations which it imposes. A complete, unbreakable agreement on the part of the minister thus ordained, to follow in the footsteps of Christ Jesus, is entered into. The one ordained cannot turn aside from his covenant to preach, for any reason. The covenant requires faithful preaching, even to the point of death. An ordained minister of Jehovah God cannot turn back without violating his covenant. The turning back from preaching will result in his everlasting death, because God declares that covenant-breakers are worthy of death.—Acts 3:23; Romans 1:31, 32.

A pioneer, as that term is used by Jehovah's witnesses, means a minister who devotes substantially his full time to the preaching of the gospel as a missionary evangelist. Each pioneer, full-time missionary evangelist, in order to devote his full time to the substantial exclusion of other activities, is required to strive for a quota of 150 hours of actual house-to-house and public preaching as a missionary evangelist.*

Becoming a pioneer does not mean that such person thereby becomes a minister. Before becoming a full-time missionary evangelist the pioneer has been ordinarily engaged in part-time preaching of the gospel for a considerable period. The ordinary pioneer has been ordained long prior to his entry into the full-time missionary evangelistic

* A special pioneer is required to devote 175 hours per month to actual door-to-door missionary preaching. (1945 *Yearbook of Jehovah's witnesses*, p. 60) They averaged during the year 1944 165.9 hours per month. (*Ibid.* p. 59) See also 1944 *Yearbook of Jehovah's witnesses*, pp. 57-60. A general pioneer has set for him a quota of 150 hours per month to actual house-to-house missionary evangelistic work. (1945 *Yearbook of Jehovah's witnesses*, p. 60) The average hours devoted to the missionary work was 130.2. (*Ibid.* p. 62) See also 1944 *Yearbook of Jehovah's witnesses*, pp. 60-62.

work. His taking on the full-time missionary evangelistic work as a pioneer merely means that he has assumed a higher status in the organization. It merely signifies that he devotes all of his time to preaching instead of part of his time. He thereby has heavier duties and greater responsibilities. He acts as a direct representative of the legal governing body of Jehovah's witnesses. He is subject to assignment to do missionary work in communities that are well populated as well as those sparsely populated. He may be required to do missionary work in communities where there are none of Jehovah's witnesses. He may be required to act as an itinerant evangelist, moving from place to place.

While no particular worldly education or a degree from a theological school is required as a condition precedent to the enrollment of a minister in the full-time pioneer missionary evangelistic work, there are certain requirements that must be complied with. The minister desiring to enter the full-time missionary work as a pioneer must satisfactorily establish that he possesses the necessary qualifications. He must show that he has a thorough knowledge of the Bible and is apt to teach and preach. He must have studied thoroughly the publications of the Watchtower Bible and Tract Society explaining the doctrines and teachings of the Bible as viewed by Jehovah's witnesses. Ordinarily it will be found that a pioneer has regularly attended, for a satisfactory period of time, one of the ministry schools conducted by Jehovah's witnesses.*

It has ever been the policy of the legal governing body of Jehovah's witnesses, *The Watchtower Society*, to use its journals and other publications as a means to encourage part-time ministers to join the full-time pioneer missionary evangelistic work. Also each year special letters have been written from the headquarters to all of Jehovah's witnesses everywhere, encouraging them to become pioneers in the missionary field. These campaigns to increase the full-time evangelistic force of Jehovah's witnesses have been carried

* See APPENDIX, pp. 58a-61a.

on annually and for many years before the Selective Training and Service Act of 1940 was passed. On other occasions in this court and in the circuit courts of appeals where the Government has opposed Jehovah's witnesses the Government has called attention to the efforts of the Society, acting as the governing body of Jehovah's witnesses, to increase the number of pioneers since beginning of the war. In such instances the Government makes no reference to the same efforts of the years previous to the Selective Training and Service Act. The Government usually makes reference to the 1942 *Yearbook of Jehovah's witnesses*, where it is said, *inter alia*, that: "During the year a series of special letters were sent to all companies, calling attention to the wonderful privilege of service set before them in the full-time work. The response to the call to pioneer service was excellent. . . . By the end of the year a grand total of 2,093 new pioneers had been enrolled. In closing the records of the Society at the end of the year it was found that there are 5,463 actually enrolled in full-time service." (P. 46) The Government has argued that the letters written by the Society were to encourage men to join the full-time missionary work to escape their duty under the draft act. Nothing could be farther from the truth, as is abundantly attested by the letters * themselves

* These letters mentioned in this *Yearbook* as being the ones that unduly encouraged the pioneer ranks are handed up to the court for examination. Consideration of these letters shows that they are the same type of letters that had been written in previous years to pioneers. They are ordinary appeals to joining the pioneer ranks, without any reference to the Selective Training and Service Act or the war. A reading of the various yearbooks for each year will show that similar appeals were made. Some appeals resulted in large increases. Others did not. See the *Yearbook of Jehovah's witnesses* for each year hereinafter listed, to wit, 1940 at page 58; 1939 at page 59; 1937 at page 65; 1936 at page 53; 1935 at page 41; 1934 at page 43; 1933 at page 50; 1932 at page 56; 1931 at page 67; 1930 at page 56; 1929 at pages 55-56. In the 1929 *Yearbook of Jehovah's witnesses* just referred to it shows that as a result of the campaign for new full-time publishers 1000 new pioneers were enrolled that year.

that were referred to in the 1942 *Yearbook* as written to Jehovah's witnesses. Also reference is made to the 1943 *Yearbook of Jehovah's witnesses* where it is said that a convention was held in September, 1942, and that, "The call went forth for 10,000 pioneers in the United States by next April; and, from the way the brethren have applied for pioneer service since this convention, it appears very likely that we shall have 10,000 in the United States. Within four weeks after the convention ended 600 new applications for pioneer service had been received at this office." (P. 67)

Every one of Jehovah's witnesses desires ultimately to devote his entire time and life to preaching the gospel. This they consider to be the primary obligation of their lives. It means preaching until death or until Jehovah's battle at Armageddon. Jehovah's witnesses and their legal governing body know that the "harvest is plenteous, but the labourers are few; pray ye therefore the Lord of the harvest, that he will send forth labourers into his harvest." (Matthew 9:37, 38) This command for gaining for the work more ministers to assist in preaching the gospel in all the world and unto every creature is applicable in wartime as well as in peacetime. By each one devoting more time to preaching he is 'provoking willing hearers to love and good works, . . . exhorting, and so much more' as the day approaches. (Hebrews 10:24, 25) Because Jehovah's witnesses have carried on the same campaign to increase their ranks in wartime as they have in peacetime is no ground for arguing, as has the Government, that Jehovah's witnesses are unduly taking advantage of the draft law to increase their numbers. The statistics do not prove that the argument of the Government is correct.

There has not been an extraordinary increase in the number of pioneers from Jehovah's witnesses since the first registration under the Selective Training and Service Act. Since 1941 the annual increase of Jehovah's witnesses, full-time pioneers and company publishers (part-time ministers), has been natural and not out of proportion to the

increase of previous years. The records of the number of full-time and part-time ministers of Jehovah's witnesses appearing in the *Yearbooks* of Jehovah's witnesses have been considered. These annual records show a proportionate increase yearly in full-time pioneer ministers and part-time ministers, company publishers. They are set forth below and compared with the number of persons attending conventions of Jehovah's witnesses in the same years.

The proportionate number of Jehovah's witnesses, full-time and part-time missionary evangelists, compared to the total population of the country, is approximately the same as the proportion of Catholic priests to the population. Priests of the Roman Catholic Hierarchy number approximately 36,000. They serve approximately 22,000,000 Catholics. The total number of Jehovah's witnesses is 61,172. (1945 *Yearbook of Jehovah's witnesses,* page 56) They serve 70,000,000 nonchurch members and an untold number of millions of members of religious organizations. The total number of full-time missionary evangelists was 5,046, or an average of one pioneer to each 26,000 persons in the United States. Whereas, compare this with the fact that there is one Roman Catholic priest to every 3,611.

The term "company publisher" as used by Jehovah's witnesses describes the part-time missionary evangelist. Throughout all history there have been part-time ministers.

Year	Pioneers	Company Publishers	Convention Attendance	Yearbook
1932	1,997			1933 p. 50
1933	1,976	16,058		1934 p. 43
1934	1,976	18,967	15,000	1935 pp. 41, 48-49
1935	1,829	20,786	20,000	1936 pp. 53, 55
1936	1,831	21,415	25,000	1937 pp. 68-69, 75
1937	1,838	21,689	30,000	1938 p. 56
1938	1,910	25,596	65,000	1939 pp. 59, 74
1939	2,176	35,466	75,000	1940 pp. 56, 69
1940	2,686	47,762	79,335	1941 pp. 71, 90
1941	4,049	56,745	115,000	1942 pp. 42, 59
1942	5,290	62,179	129,699	1943 pp. 39-40, 68
1943	6,278	62,762	167,000	1944 pp. 56, 57, 85
1944	5,046	61,172	140,000	1945 pp. 56, 58, 60, 83

Indeed, the early history of the recognized orthodox non-Catholic organizations in this country shows such were served almost exclusively by part-time ministers. Some organizations today do not have a paid clergy. Thousands of orthodox churches, especially in rural communities, depend entirely for the services of a minister upon ministers who perform their services gratuitously. All of these ministers depend almost entirely for their support and maintenance upon secular jobs performed by them during the week.*

The facts show that the ordinary part-time missionary evangelist of Jehovah's witnesses, known as company publishers, devotes more hours to actual preaching and teaching as a minister than do the orthodox clergy. The orthodox clergyman preaches a sermon once or twice a week and makes a few visits upon the poor and needy, and the rest of the time is ordinarily at his own disposal. The time during the week when the orthodox minister is not regularly engaged in preaching, the company publishers of Jehovah's witnesses are earning a livelihood at various secular jobs. However, they regularly preach the gospel of God's kingdom. They function, therefore, as regular ministers of religion, within the meaning of the Act.

The provisions for the exemption of ministers of religion appearing in the Act and Regulations should be given a liberal construction and interpretation, in order to include the regular and duly ordained ministers of every recognized religious organization. As has been seen, the exemption is for the benefit of the nation and the people as a whole. Therefore, a construction should be placed on the Act and Regulations which is in keeping with the spirit

*"3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some *religious organizations* ["churches" appears here instead of "religious organizations" in unamended original] both practice and necessity require the minister to support himself, either partially or wholly, by secular work."—State Director Advice No. 213-B as amended September 25, 1944, National Headquarters, Selective Service System.

of the institutions of this country built for the purpose of preserving freedom of worship and encouraging it. The courts uniformly held that a broad and liberal interpretation should be placed upon the provisions of the various State constitutions exempting from taxation property of religious organizations used for religious purposes. (*Trustees of Griswold College* v. *State*, 46 Iowa 275; *Watterson* v. *Halliday*, 77 Ohio St. 150, 82 N. E. 962; *Matter of* v. *Canevin*, 213 Pa. 588, 63 Atl. 131; *Congregational Society of Town of Poultney* v. *Ashley*, 10 Vt. 241, 244. Cf. *Shaarai Berocho* v. *New York*, 60 N. Y. Super. Ct. 479, 18 N. Y. S. 792.) For the same reason expressed in these decisions a similar generous and broad construction should be placed upon the provision for exemption provided in the Selective Training and Service Act. The extension of the benefits of the exemption provided for in the Act and Regulations is made without regard to the popularity or unpopularity of the various religious organizations in the country. It has never been the policy of the law to choose between religious organizations or to discriminate between orthodox and unorthodox organizations.

Webster's *New International Dictionary* defines a "minister" to be "one authorized or licensed to conduct Christian worship".

"The phrase 'minister of religion' is wide enough to embrace any evangelical office, and has about it more of the savor of humility than 'pastor'." *Encyclopædia Britannica* (13th ed.) Vol. 18, p. 542.

"Minister" or "minister of the gospel" is a comprehensive term, and of uncertain significance. Ministers are spoken of as public teachers of piety, religion and morality. (New Hampshire Constitution, Art. 6) They are sometimes called "ministers of the gospel" and sometimes "ordained ministers of the gospel", a term less comprehensive in its significance. *Kidder* v. *French*, N. H., Smith, 155, 156.

A statute pertaining to authority to perform marriages by clergymen includes ministers of every denomination and

faith. *Haggin* v. *Haggin*, 35 Neb. 375, 53 N. W. 209, 211.

"Ministers" as used in a tax exemption statute includes a person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church though he had no authority to administer the sacrament of the communion. *Baldwin* v. *McClinch*, 1 Me. (1 Greene) 102, 107.

"Minister of religion" as used here provides that every minister of religion, authorized to preach according to the rules of his church and regularly employed in the discharge of his ministerial duties, shall be exempt from military service, etc., includes a minister who belonged to a religious sect who performed ministerial labor gratuitously, and who resorted to secular employment as a means of subsisting himself and his family. If "regularly employed" as a minister, the fact that in the interval between appointments he pursued some other avocation, which did not according to the rules of his church disqualify him for the sacred function of the ministry, cannot take his exemption from him. *Ex parte Cain*, 39 Ala. 440, 441.

Since the very beginning of this nation the country has been a haven for dissentient religious groups. Persecuted ministers of various religious denominations have fled from all other countries under the sun to this nation. Dissentient groups and organizations have sprung up by scores during the last 150 years. Schisms from orthodox and unorthodox denominations have multiplied by the thousands. According to federal census reports, in 1936 in the United States there were 256 religious bodies with 199,302 different religious organizations in addition to Jehovah's witnesses. *The World Almanac* 1945 (New York *World-Telegram*) p. 365. The Director of Selective Service has declared that an extremely liberal interpretation must be placed upon the Act and Regulations providing for the exemption. (*Selective Service in Wartime*, p. 241) He has given a liberal effect to the Regulations by providing for exemption of the lay brothers of the Roman Catholic Church. "It

appears that Catholic Brothers have made profession of the vows required of them by their respective religious Congregations, such as poverty, chastity, obedience, and are said to devote all of their time to their congregations. Moreover, when the Selective Training and Service Act was being discussed in Congress, it was made clear that it was intended that the Brothers were included in the purview of the statutory exemption from training and service of regular ministers of religion. It is believed that they are and should be considered 'regular ministers of religion.'" (State Director Advice 213-B as amended September 25, 1944, National Headquarters, Selective Service System.) His opinion declares that these men, who number many thousands in the United States, shall be completely exempt and entitled to the IV-D classification allowed ministers of religion. These men are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy, but do menial work in the religious institutions of the Hierarchy. They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain to the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits". See *The Catholic Encyclopedia*, Vol. 9, p. 93.

Due to the fact that there are nearly three hundred different religious groups in the country, and thousands upon thousands of various religious organizations, including orthodox and unorthodox, it must be assumed that Congress intended to make provision for every *bona fide* minister of religion of every religious organization. This is the only conclusion that can be reached in order to be consonant with sound law. It cannot be said that because Jehovah's witnesses are not in favor with the religious and political powers that be, as a matter of law the exemption provided for in the Act and Regulations does not apply to them.

In providing for exemption Congress contemplated that

persons devoting their lives to spiritual affairs as ministers are doing something for the benefit of the public, necessitating their exemption from training and service, regardless of whether the minister performing such service is representing a popular or unpopular, orthodox or unorthodox, organization. It is necessary to provide a very broad interpretation upon the exemption provision appearing in the Act and Regulations, so as to include any group, organization or society. If a broad interpretation is not placed upon the exemption, then oportunity is presented for discrimination. The records of history show that religious differences and the difficulty of reconciling the views of another on religious subjects has provided the greatest field of prejudice and religious discrimination. Members of draft boards are not impervious to the prevalence of this prejudice.

The provision for the exemption of ministers of religion from training and service in the armed forces of other nations has been given a very liberal interpretation. The English Court of Appeal held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord* v. *Hiscock*, 86 L. J. K. B. 941) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the Justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Saskatchewan held that a registrant was entitled to exemption from all

training and service as a minister of religion. (*Bien* v. *Cooke*, 1944, 1 W. W. R. 237) There the minister spent six days a week farming. No special educational requirements were necessary. All that was required was that he satisfy the general secretary, who was a railroad engineer, that he believed the New Testament, and that he met the necessary moral requirements.

In *Ex parte Cain* (39 Ala. 440, 441) the Alabama Supreme Court considered the provision for the exemption of ministers of religion from all training and service under the conscription act of the Confederacy during the Civil War. In that case Cain performed his ministerial duties once a week gratuitously. During the remaining six days of the week he engaged in secular employment as a means of supporting himself and his family. It was held that he was a regular minister of religion under the act because he regularly preached once each week. The court held that as a minister of religion he was exempt from all training and service.

The federal judiciary should be entirely neutral with respect to religious persuasions and beliefs. All organizations, regardless of their orthodoxy or unorthodoxy, should be entitled to the same privileges and rights under the law. The law and the courts are no respecters of persons or religious organizations. Religious groups and their respective ministers are not required to measure up to some orthodox yardstick. A realistic approach to the construction of an act providing for benefits to religious organizations requires that the federal courts make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe*, 31 Beavin 14). The theory of treating all religious organizations on the same basis before the law is well stated by the court in *Watson* v. *Jones*, 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any

religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided in Section 5 (d) of the Act for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

Daniel Webster, in his memorable argument in the *Girard Will* case, said, *inter alia,* that "all proclaim that Christianity, general tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general tolerant Christianity, is the law of the land." (Works of Daniel Webster, Vol. 6, p. 176; 10 Mich. L. Rev. 176) "The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them and yet prevent them from entering into and influencing, more or less, all our social institutions, customs and relations, as well as our individual modes of thinking and acting. It is involved in our social nature that even those among us who reject Christianity, cannot possibly get clear of its influence, or reject those sentiments, customs and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life." *Mohney* v. *Cook,* 26 Pa. 342, 347.

Mr. Justice Brewer in *Holy Trinity Church* v. *United States,* 143 U. S. 457, said that this country was a Christian nation. See his opinion at page 471.

In view of these laudable expressions of the Christian policy of the nation it must be assumed that Congress in

providing for the exemption of ministers of religion did not intend to mean only some ministers of some organizations. Therefore, a construction must be placed upon the Act to include all ministers of all religious organizations whose lives are devoted to the performance of their duties as ministers. The true test in every case is whether or not one is devoting his life in the service of his organization as a minister, whether as an ordained minister of religion or a regular minister of religion.

In determining whether or not a minister of a religious organization is entitled to the exemption under the Act the court cannot apply the orthodox yardstick. Moreover, the courts cannot substitute their private opinion as to whether a person claiming exemption is entitled to the exemption on the basis of whether he performs the same duties as do the clergy of the orthodox religious denominations. The courts cannot employ the methods and activity of the recognized orthodox religious denominations as a guide for determining whether the ministers of Jehovah's witnesses, a dissentient and unorthodox group, are entitled to the exemption. It was the intention of Congress to make provision for the protection of the worship of little people by exempting ministers of all organizations, whether large or small, rich or poor, popular or unpopular, orthodox or unorthodox.

If the provisions for the exemption of ministers of religion in the Act and Regulations are given a construction so as to exclude Jehovah's witnesses, then an unreasonable construction is placed upon the Act and Regulations. Such an interpretation would result in discrimination.

"It is not for a court upon some *a priori* basis to disqualify certain beliefs as incapable of being religious in character. . . . It should not be forgotten that such a provision as Section 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities,

and in particular of unpopular minorities." *Adelaide* [Australia] *company of Jehovah's witnesses, Inc.* v. *The Commonwealth*, 1943, 67 C. L. R. 116, 128.

The courts are not authorized to proceed to judge the qualifications of a minister of a religious organization on the basis of the personal views of the judges of the court. Mr. Justice Galanders of the Ontario Court of Appeal, in *Donald* v. *Board of Education*, 1945, O. W. N. 526, said: "It would be misleading to proceed on any personal view on what such exercise might include or exclude." If courts were permitted to judge according to their personal knowledge what constitute duties of a minister of a religious organization, based on the experience had and knowledge obtained from association with ministers of popular orthodox denominations, the law would change with the complexion of every judge. In that event every time there should occur a change in the personnel of the court that would give rise to a change in the law. If it is permissible for the judges of a court to decide that a minister, duly appointed according to the custom of his faith and regularly serving as a minister, is not entitled to the exemption provided for in the Act because the activity of the minister is not performed in a way with which the judges are personally familiar and approve of a proper preaching—if this form of judicial determination were permitted in arriving at the construction to be placed upon the Act and Regulations, a Catholic judge could decide that a Presbyterian minister is not a minister under the Act and Regulations, and the Baptist judge could decide that a Catholic priest is not a minister of religion within the law. The illustrations could be increased *ad infinitum*. Under such process, instead of being governed by law, the people would be governed by men. The exemptions in the Act and Regulations would operate according to the swing of the pendulum of decisions as the religious complexion of the court changed with the appointment of judges.

It has been judicially declared that were "the adminis-

tration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches*, 1 Sandf. Ch. 439, 507 (N. Y.) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker as all, possessing equal rights." (*Donahue* v. *Richards*, 38 Me. 379, 409. Cf. *People* v. *Board of Education*, 245 Ill. 334, 349; *Grimes* v. *Harmon*, 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshipping the Supreme Being." (*State ex rel. Freeman* v. *Scheve*, 65 Neb. 853, 879) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele*, 2 Barb. 397) "So far as religion is concerned the laissez faire-theory of government has been given the widest possible scope." (*State ex rel. Freeman* v. *Scheve*, 65 Neb. 853, 878, 93 N. W. 169)

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township*, 2 Ohio 108; *State* v. *Trustees*, Wright 560 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether their adherents to his mind smack of fanaticism or not; he has no right to act upon such

individual opinion in administering justice. (*People* v. *Pillow*, 3 N. Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher*, 49 Mass. 153; *Gass* v. *Wilhite*, 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy*, 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society*, 6 N. Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. (*Waite* v. *Merrill*, 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245)

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." *Minersville* v. *Gobitis*, 310 U. S. 586.

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion and unconventional ways is still far from secure. Theirs is a militant and

unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law,' 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." *Prince* v. *Commonwealth*, 321 U. S. 158.

It has been argued that draft boards and courts can exercise their ordinary, common knowledge obtained through human experience in rejecting the claim of Jehovah's witnesses. Of course in answer thereto petitioner does not argue that the judge should not exercise common sense and knowledge of the law. What the Government attempts to cajole the court into holding is that the draft boards and other personnel of the Selective Service System that have to do with the claims for exemption can reject the claim of Jehovah's witnesses on the ground that their experience with orthodox religions, when compared to the activity of Jehovah's witnesses, does not permit the claim that they are ministers within the meaning of the Act. In other words, the Government wants the boards and the courts to judge Jehovah's witnesses according to the practices of orthodox religious clergymen in the popular religious denominations. The Government desires to have the court restrict the exemption and it is desired that the exemption be confined to ministers having congregations. The Government desires to have the board and the courts to hold that unless the witness of Jehovah in making the claim for exemption showed that he stands in relation toward organizations of their denominations, such witness would not be entitled to claim the exemption. In making this argument the Government urges the court to place a discriminatory construction upon the Act, which is unreasonable. The Government desires that the members of

the draft boards and the judges of the courts adopt the standards of the orthodox religions, of which they have knowledge by reason of human experience, and thus reject the valid, *bona fide* claims for exemption made by Jehovah's witnesses, because they do not practice and preach the same way that the orthodox clergy do. Such argument is wholly inadmissible.

The Government argues that the activity of Jehovah's witnesses and their claim for exemption as ministers of religion are contrary to the experience of human knowledge. "I find difficulty in understanding what is meant by the expression 'contrary to the principles of human knowledge'. If what is meant is, 'contrary to what is generally accepted as true', I know of no reason in law or morals that forbids the propagation of views which are opposed to what is generally accepted as true. To deny the right to do this presupposes the infallibility of human judgment, and would bar the way of progress in every direction scientific and otherwise." Chief Justice Meredith of the Ontario Court of Appeal, *In re Orr,* 1917 40 O. L. R. 567, 592.

The doctrines advocated by Jehovah's witnesses and their method of preaching them may appear strange to the judges of the court. But the court should not be astute to determine whether or not a religious organization is running its affairs according to recognized standards. The court should allow a religious organization extreme liberality and wide latitude as to the mode in which its governing body may think it best to carry out the purposes of the organization. If Jehovah's witnesses decide that it is more proper to preach from house to house than from a pulpit; if Jehovah's witnesses decide that it is more proper to ordain by water immersion than by elaborate religious ceremony; if Jehovah's witnesses decide that no one will be permitted to act as one of Jehovah's witnesses unless he is a minister, instead of having a clergy and laity class; and if Jehovah's witnesses decide that it is better to have printed credentials of ordination rather than an elaborate

certificate issued by a theological seminary, then such judgments and choices of the legal governing body of Jehovah's witnesses should be accepted by the court as binding upon the court in so far as the propriety of the preaching by Jehovah's witnesses is concerned. It is not for the court to say that this is not the businesslike and proper way of doing things. Indeed, it is the duty of the court to recognize and give effect to the decisions of the legal governing body of Jehovah's witnesses as to the appointment and proper conduct of the organization's ministers.

When a court undertakes to say what proper form of ordination, teaching and preaching as used by any religious organization is improper, then the court is going beyond the scope of its authority. Under such circumstances the court would be setting itself up as a super-governing body of religious organizations. Certainly it is not competent for a court to invade the field of worship by denying exemption on the ground that the activity is not carried on according to orthodox experiences. If the courts were permitted to decide on such a basis, the courts would be illegally usurping power of telling the religious organizations how to run their spiritual affairs. If Jehovah's witnesses are in agreement as to the method that they have chosen to preach the gospel and it does not involve a violation of the laws of morality and an invasion of the rights of property, it is not for the courts to say, because of the failure of the judges to understand their method of operation, that they are not entitled to the exemption. If the mode of activity is acceptable to Jehovah's witnesses, then the inability of the judges of the court to agree with them as to the propriety of such method of preaching is wholly irrelevant. It is of no moment that members of the court would believe that it is theologically inapt to preach the gospel in the manner as do Jehovah's witnesses, having in mind the methods of the orthodox churches to which some members of the court may belong.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining

whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemption, saying: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

In the decision styled *In re Reinhart* (9 Ohio Dec. 441, 445) the court said: "The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches; consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.'"

It cannot be argued that Congress intended to discriminate between ministers of any religious organization. It is highly improper and asking that an unreasonable construction be placed upon the Act to impute to Congress the intention of saying that only some ministers of religion shall be exempt from training and service. Congress did not intend to forge an instrument that may be used to oppress ministers of unpopular and unorthodox religious organizations.

If the argument of the Government that the draft boards can decide the claim for exemption by ministers under the Act according to their own private personal experience, then there would be not a case standing in the entire record of the Selective Service System where any unorthodox or dissentient minister received the exemption. In a Catholic territory the Protestant ministers would be denied exemption. In a Protestant community the Catholic priests would be denied exemption. Thus, even the most orthodox denominations would be in jeopardy in many communities and the executive department, acting through the administrative agency, would be repealing the Act of Congress that provides for the exemption. The Selective Service System would be entirely free to ignore the law.

If the specious, unsubstantial arguments of the Government made against Jehovah's witnesses are adopted by the court, then no religious organization in the land can depend on the exemption provisions of the Act. If the administrative agency can decide that the exemption is to be applied only to some ministers of some denominations, and that other ministers are excluded from the provision, then the very purposes of Congress have been defeated.

Moreover, the Government advocates that the draft boards have the right to ignore the undisputed evidence in arriving at classifications. Indeed, the Government argues that the Selective Service System can reject unimpeached written statements and affidavits of persons acquainted with Jehovah's witnesses who make claims for exemption as ministers of religion before draft boards, and render decisions directly contrary to the unimpeached record.*

This argument for the undue assumption of power by the draft boards, if adopted by the courts, would give them greater powers than any other agency ever created by law. Even judges and juries do not have the right to reject

* "Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status." State Director Advice 213-B, as amended September 25, 1944, National Headquarters, Selective Service System.

undisputed evidence. To reject undisputed evidence is a violation of the right of due process. A decision by the draft board in the teeth of the evidence is dishonest. A dishonest decision is arbitrary and capricious. An arbitrary and capricious decision, contrary to the evidence, is unlawful and void. *Johnson* v. *United States* (CCA-8) 126 F. 2d 242, 247. "If it flies in the teeth of the facts which are before it, then its action is arbitrary and the registrant has not been afforded due process of law." SWYGERT, J., *Hull* v. *Stalter*, 61 F. Supp. 732.

If the draft boards are allowed to arrogate to themselves such extraordinary power, then no person would ever be able to establish any claim contrary to the whims and caprices of the members of the draft boards and the Selective Service System. Even a judge who claimed deferment under the Act could be denied his claim for deferment from military training and service because the boards would have the authority to reject his written evidence proving his status as a judge of a court of record. If arbitrary and capricious draft boards have this power, then indeed they have been authorized by Congress to repeal the parts of the Act allowing deferment to members of Congress, members of State legislatures and the Governors of the various states.

It seems only reasonable to conclude that no draft board has the power to arbitrarily and capriciously reject undisputed written evidence and render a decision contrary thereto. Especially is this true in the cases where the written evidence submitted to the board is undisputed. The power of the draft boards to reject written proof is confined only to instances where it can be established that the evidence is unreliable, false, discredited or impeached.

Determination of draft boards contrary to the undisputed evidence must be supported by some evidence. If a determination is made upon some grounds contrary to evidence received, the Regulations provide that the evidence relied upon by the board should be reduced to writing and

placed in the registrant's file. (Reg. 627.13 (b)) This is absolutely necessary in order to preserve due process and the rights of the registrant upon appeal. Moreover, it is imperative that the draft boards make a record of the evidence they rely upon that does not appear in the file, in order that the board of appeal can properly perform its function in reviewing the determination upon appeal. How can a board of appeal properly pass upon the validity of a classification unless it has advantage of the same evidence that a draft board has? The board of appeal considers only that which is reduced to writing. (Regs. 615.43, 627.13) It is mandatory that the boards reduce the evidence to writing in order that the file forwarded to the board of appeal, which classifies the registrant *de novo*, may be complete. (Regs. 615.43, 627.13) Congress did not intend to give unlimited power to a draft board nor authorize it to reject undisputed evidence and arbitrarily and capriciously classify the registrant according to rumors, hearsay and other incompetent evidence.

SIX

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely Smith's right to have the jury pass upon the issue of the validity of his defense.

The court below held that "there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. . . . That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right." (63)

The entire draft board file of petitioner was offered in evidence. It was excluded by the court and marked for identification. (8) This was defendant's exhibit A for iden-

tification. It showed that petitioner had been brought up by his mother as one of Jehovah's witnesses. It also revealed that petitioner attended college at the instance of his father, who was not one of Jehovah's witnesses. His mother desired him to become a full-time pioneer missionary evangelist of Jehovah's witnesses; his father did not. While attending college, he actually devoted more than sixty hours per month to house-to-house preaching. Prior to May 1943, he occupied a position with the local congregation of Jehovah's witnesses as assistant to the presiding minister. He regularly performed ministerial duties in spite of his college curriculum. In May, 1943, he applied for service as full-time pioneer missionary evangelist. On June 1, 1943, he began work as a full-time missionary evangelist.

The appeal board gave him his final classification on June 13, 1943. Under the Act and Regulations, Smith was entitled to have his ministerial status determined as of the date of his final classification. *Application of Greenberg*, 39 F. Supp. 13. In *Hull* v. *Stalter*, 61 F. Supp. 732 (DC-Ind.) decided February 9, 1945, the Government conceded in oral argument that the registrant was entitled to be classified upon the records made in his case as of the date of the final classification.

At the time petitioner was classified on June 17, 1943 he was engaged in the full-time pioneer missionary evangelistic work. However, the undisputed evidence in his file showed that he had been regularly performing duties as a minister of the gospel for several years prior to the filing of his questionnaire. Moreover, it showed that he was an ordained minister of the gospel and of Jehovah's witnesses at the time he filed his questionnaire with the local board. Although he may have been attending college at the time he registered, he had discontinued attendance at college before June 17, 1943, when he was classified by the appeal board, at which time he was engaged in the full-time pioneer missionary evangelistic work.

Assuming that his case is to be decided as of April

1943, the time he was classified by the local board, it still would not be harmless error to exclude the evidence. The undisputed evidence showed that he was an ordained minister of religion at the time the local board classified him. If there was any issue of fact before the board as to whether or not he was claiming classification as a minister of religion in good faith, it was a matter for the jury to finally decide in defense to the indictment. The circuit court of appeals and this court cannot assume that petitioner falsified his claim or that the undisputed evidence showed that he was not claiming classification as a minister in good faith.

The defense of whether or not petitioner was a minister of religion should have been submitted to the jury for determination. In a criminal prosecution it is beyond the power of the district court or the circuit court of appeals to hold that a defendant does not have a right to have the issue of his guilt submitted to the jury. If the undisputed evidence did not show that he was not guilty, then there was an issue of fact raised as to his guilt. The failure of the trial court and of the circuit court of appeals to hold that petitioner was entitled to have this issue submitted to the jury violated his constitutional right of trial by jury. *United States* v. *Taylor*, 11 F. 470, 471; *Cain* v. *United States*, 19 F. 2d 472; *Blair* v. *United States*, 241 F. 217, cert. den. 244 U. S. 655; *United States* v. *Stevenson*, 215 U. S. 190, 199; *Patton* v. *United States*, 281 U. S. 276.

The attendance of the petitioner at college, while regularly pursuing his ministerial activities, does not, as a matter of law, withdraw from the consideration of the jury whether or not he was exempt as a minister of religion. "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister." (*Trainin* v. *Cain*, CCA-2, 144 F. 2d 944) See also *Ex parte Stewart*, (DC-Calif.) 47 F. Supp. 415, 420. In the cases

of *Ex parte Cain*, 39 Ala. 440-441, *Offord* v. *Hiscock*, 86 L. J. K. B. 941, and *Bien* v. *Cooke* (1944) 1 W. W. R. 237, each of the persons claiming exemption from military training and service was employed in secular work during the week and preached once a week as a minister of religion on Sundays. Each of those decisions held that particular determinations by the administrative tribunals were arbitrary, capricious and illegal because denying the claim for exemption on the ground that they were engaged in secular work. Regardless of whether this court holds as a matter of law that one is a minister who performs secular work during the week and engages in ministerial work regularly on Sundays and at other times during each week, the court cannot hold as a matter of law in the face of these decisions and the liberal interpretation placed upon the Act that one who does perform secular work to sustain himself in the ministry is not a minister of religion within the meaning of the Act. This being true, it is an issue for the jury or at least for the trial court. The trial court did not perform its judicial function on the question. The petitioner did not have a judicial trial before the trial judge on the issue of whether or not he was exempt. Indeed the trial court excluded all the evidence and refused to pass on the question. It is improper for an appellate court to approve such illegal procedure on the part of the trial court because the appellate court is of the opinion that the draft board was not arbitrary and capricious in making its determination. It was the duty of the trial court to first pass on this question in order that it could be properly reviewed in the appellate court. Not having been passed on either by the trial court or the jury it is fundamental and reversible error to withhold the issue from the jury regardless of what the circuit court of appeals thought about the matter of the merit of petitioner's claim for exemption.

Petitioner has been seeking a judicial trial on this issue but has not yet received it. The judgments of the courts below should not be affirmed on the ground of harmless

error. If this doctrine of the circuit court of appeals is affirmed then all manner of errors committed by the trial courts in excluding evidence in criminal cases can be whitewashed on the ground that the circuit court of appeals was of the opinion that the evidence was unbelievable. The exercise of the judicial function by the circuit court of appeals is no excuse for the unconstitutional refusal of the district court to exercise its judicial powers in reviewing the evidence.

SEVEN

Estep's procedural rights to due process of law were violated by his local board withholding evidence from the board of appeal, preventing it from properly determining his rights under the Act and Regulations, contrary to the Fifth Amendment to the United States Constitution.

The Regulations require that the local board place in the registrant's file all papers submitted by him pertaining to his occupational status and classification. Section 615.43 (a) provides, *inter alia*, "Every paper pertaining to the registrant except his Registration Card (Form 1) shall be filed in his Cover Sheet (Form 53)." The excluded evidence showed that the local board failed to place in the registrant's file vital evidence submitted by Estep pertaining to his status under the Act.

After Estep had taken his appeal and before his file was forwarded to the board of appeal he offered to the local board additional evidence in writing. The board refused to receive that evidence, the clerk falsely informing him that his file had been forwarded to the board of appeal. In May 1944, having learned that the board had not forwarded his file to the board of appeal, Estep procured additional evidence in writing, which was mailed, together with affidavits tendered in 1942, to the local board for placing in his file.

The local board, although Estep's papers were received by it before his file was forwarded to the board of appeal, did not place that documentary evidence in Estep's cover sheet as required by the Regulations. The board of appeal did not see or consider all that additional documentary evidence. It did not know of the action of the local board in withholding the documents. Estep's classification was affirmed solely because of the local board's failure to include the documents in his cover sheet. The classification of Estep would have been different and he would probably have been declared exempt from all training and service by the board of appeal had the local board complied with the Regulations and included those papers in the file.

Inasmuch as no classification is permanent (Reg. 626.1) it was the duty of the local board to receive additional evidence pertaining to Estep's status during the eighteen months following his classification, which was submitted before the file was forwarded to the board of appeal. Section 626.2 of the Regulations provides that the local board may reopen and consider anew a registrant's classification upon written request presenting facts in writing not considered when the registrant was classified, "which, if true, would justify a change in the registrant's classification."

It was the duty of the local board, upon its refusal to reopen and reconsider Estep's classification as requested by him, to notify him that the documentary evidence did not "warrant the reopening of the registrant's classification" and to "place a copy of the letter in the registrant's file." (Reg. 626.3) This regulation required the local board to place in Estep's file the documentary evidence received by it even though the board refused to reopen his classification.

Moreover, it was the duty of the local board under other regulations to receive the documentary evidence and place it in Estep's file, irrespective of the regulation pertaining to reopening of a registrant's classification. Section 627.12 of the Regulations provides that the registrant may make a written appeal statement specifying the particulars in

which the board erred and in addition thereto may submit in writing any information offered to the local board "which the local board failed or refused to include in the registrant's file."

Regardless of whether Estep was entitled to have the documentary evidence placed in the file on the ground that it was submitted for the purpose of reopening his classification, or for the purpose of constituting a written statement upon appeal and additional documentary evidence supporting same, it was the duty of the local board to place the papers in Estep's cover sheet and forward them to the board of appeal. Section 627.13 of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete."

There is no time limit in Regulation 627.12 as to when the "statement" or the "information which was offered" and which the board "refused to include in the registrant's file" must be submitted by the registrant. The only reasonable limitation as to time of filing should be that the documents ought to be submitted to the local board before the cover sheet is forwarded to the board of appeal. For instance, if a registrant went to his board in the morning to sign his appeal he would no doubt have the right to go back to the board on the afternoon of the same day and file his appeal statement or information not received by the board, provided the file had not been sent to the board of appeal.

By force of reason he could return on the next day, or during the next week, or the next month or even the next year to file these documents as long as his Cover Sheet was still with the local board and had not been forwarded to the board of appeal. Particularly is this true when the local board had not finished with his classification on account of not having ordered him to take a physical examination, as in this case. There is no question that when Estep offered the evidence to the board in 1944 some of the documents had been rejected by the board in 1942.

Therefore under the Regulations he had the right to offer that as evidence which the board had refused him the right to file. Nor is section 627.12 confined to evidence offered at a personal appearance. It is broad and unlimited and covers any evidence which may have been offered to the local board at any time before the file is sent to the board of appeal. If this construction is not placed on this regulation then it would be possible for the local board to usurp its prerogative under Part 626 which provides for submission of additional evidence upon reconsideration.

Thus if a local board rejected evidence offered on reconsideration the board of appeal, which considers classifications *de novo*, would be deprived of its right to correct errors committed by the local board under the regulations because the local board would have the unlimited power to withhold and keep from the board of appeal any evidence offered under section 626. (The new evidence offered in 1944, not submitted in 1942, was receivable under Section 626.) It seems to be inexorable that the local board must include in the registrant's file any additional evidence offered at any time before the file is forwarded to the board of appeal. This is especially true because the board of appeal makes all its determinations *de novo*. It should be the sole prerogative of the board of appeal to determine whether or not the additional evidence shall or shall not be incorporated in the file. At least the board of appeal should have the right to consider under Part 626 and Section 627.12.

It may be argued by the Government that *Cramer* v. *France* (CCA-9) 148 F. 2d 801, 804, and *United States ex rel. La Charity* v. *Commanding Officer* (CCA-2) 142 F. 2d 381, 382, are in point. These decisions held that a registrant did not have the right to reopen his case as a matter of right, and that the refusal of the administrative agency to reopen the classification was not ground for invalidating the subsequent orders commanding the registrants to perform military service. In neither of those cases was it

shown that the local board failed to comply with regulations prescribing the procedure for reopening and reconsidering a classification. Indeed, in those cases the local boards received the evidence, placed it in the registrants' files and notified them of the refusal to reopen the classification. In each of those cases the board of appeal had opportunity to review and consider the evidence submitted on the request for reopening of the classification. In both of those cases the administrative agency accorded the registrants their rights of procedural due process. Inasmuch as the board of appeal did not have opportunity to review the illegal action of the local board by reason of its purloining the documents submitted by Estep, there was a rank denial of the right of procedural due process which distinguishes the *Estep* case from the *Cramer* and *La Charity* cases, supra.

Since the board of appeal must consider the registrant's classification *de novo* it cannot be said that Sections 626 and 627 are for the exclusive use and sole benefit of the local board. The board of appeal had a duty to perform under these regulations. It had the right to consider evidence submitted by Estep under these regulations. The duty and right of the board of appeal to perform its function in reviewing Estep's case were frustrated by the illegal action of the local board.

Since the board of appeal has the final say as to the classification to be accorded a registrant, it must be assumed that the authors of the Act and Regulations intended that the local board, in all cases where appeals were taken by registrants, should perform a duty in behalf of the board of appeal very much like a master, referee or notary public taking a deposition. It is the function of the local board to gather all the evidence for consideration by the board of appeal, which passes on all questions involved. If it were otherwise, so that the board could withhold evidence from the registrant's file forwarded to the board of appeal, the local board would have unlimited powers and arbitrary

discretion to determine just what evidence the board of appeal should or should not consider unde Sections 626 and 627 of the Regulations. Thus the authority of the board of appeal could be circumscribed and its power sapped by whimsical actions of the local board.

It is submitted that the action of the local board was a violation of the Regulations which could not be cured by the classification of Estep by the board of appeal unless the board of appeal had the opportunity to pass upon the action of the local board in excluding the evidence. Since the board of appeal knew nothing of the illegal action of the local board it was impossible for it to take action to correct the usurpation of power by the local board.

Furthermore, the alleged ambiguity of the Regulations cannot be used to justify the action of the local board. Even in absence of any regulations as to the right to file additional evidence the registrant would have the right, under the circumstances of this case, to submit additional evidence in view of the long lapse of time from the date of classification to the date of sending the papers to the board of appeal. Indeed, the due process clause of the Fifth Amendment requires such a conclusion and compels a construction to be placed upon the Regulations similar to that adopted by the Selective Service System in the *Rinko* case, because the action of the board of appeal is *de novo*. *United States* v. *Pitt* (CCA-3) 144 F. 2d 169.

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored." CARDOZO, J., *Ohio Bell Telephone Co.* v. *Public U. Comm'n*, 301 U. S. 292, 304. See, also, *Shields* v. *Utah-Idaho Central Ry.*, 305 U. S. 177, 182.

"Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is

manifest that the hearing has not been given." *Morgan v. United States*, 298 U. S. 468, 479-481.

In *Kwock Jan Fat* v. *White*, 253 U. S. 454, the administrative agency omitted and supressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country."

The duplicity and chicanery of the local board, in withholding the vast amount of evidence submitted by Estep as to his ministerial activity, are emphasized by its action on the request of the Pennsylvania State Headquarters of Selective Service System. That office asked the local board to provide additional information as to Estep's ministerial activity as late as 1944, following the decision by the board of appeal. Instead of sending all the voluminous evidence offered by Estep in May 1944, which was then in possession of the local board, the local board obtained a very inadequately short statement from Estep. It was forwarded to that office by the local board which continued to withhold the elaborate documentary evidence

submitted by Estep. (226-227) The construction placed upon the Regulations by Estep, that he was entitled to submit additional evidence, was adopted by the local board when, following his appeal, it placed in his file a prejudicial anonymous letter to which was attached a newspaper clipping concerning the sentence imposed upon Nick Falbo. (218-219) *Falbo* v. *United States*, 320 U. S. 549.[1]

The irregularity of the local board in handling Estep's case was condemned by Pennsylvania State Headquarters of Selective Service System. (228) This circumstance should be considered by the court, together with the testimony of the clerk of the local board, in determining whether or not there was a violation of Estep's procedural rights.

In addition to violating the procedural rights guaranteed by law to Estep through withholding of evidence from the board of appeal, the local board affirmatively injured Estep. It violated Section 627.13 of the Regulations by writing a false, inflammatory and prejudicial letter to the board of appeal. (223) That regulation requires that the local board, in preparing the cover sheet and in forwarding it to the board of appeal, "shall be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision."[2] The letter consisted only of argument and expression of opinion in favor of its decision.

Assuming *arguendo*, that Estep's going to the end of the selective process by refusing to submit to the induction ceremony does not exhaust the remedies sufficiently to entitle him to challenge the erroneousness of his classification, there is nevertheless a different problem presented

[1] The construction here contended for was adopted by the Selective Service System in *Rinko* v. *United States*, No. 1071, October Term 1944, cert. den. 65 S. Ct. 1086. See Record, pp. 208-213.

[2] The argument made under this point as to the violation of Estep's procedural rights, contrary to the due process clause of the Fifth Amendment, the Act and the Regulations, is fully supported by the cogent dissent of Judge Bigg. See record pages 289-299.

here. The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of appellant's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued at all. Under these circumstances the courts have held that the illegality of the order can be considered in defense to the indictment and that the doctrine of *Falbo* v. *United States, supra,* does not apply. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States* v. *Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (USDC-ND Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

The *Tung* decision is attempted to be distinguished by the majority opinion of the court below on the ground that Tung had not abandoned his administrative remedies but was attempting to pursue them. This effort on the part of the court below proves all the more that *its* decision in the instant case is in direct conflict with the *Tung* decision of the First Circuit! The undisputed evidence shows that Estep had not abandoned the administrative remedies. Indeed, he was attempting to invoke them as did Tung! The local board defiantly refused to follow the Regulations and deprived him of his right of appeal in the same way as did the board in the *Tung* case.

Conclusion

Without having had their day in court, approximately 4,000 of Jehovah's witnesses in the United States have been branded as criminals and put in federal prisons under the Selective Training and Service Act of 1940. They were convicted because the courts refused to permit them to show in their defense that the administrative determinations supporting the indictments were illegal. Such citizens have been incarcerated without a judicial trial, contrary to the Constitution.

This mountain of flesh-and-blood testimony towers high above all other records of wartime prosecutions to stand as a monument of warning to the judiciary that unless that alien doctrine which catapulted them into prison is destroyed now it will inevitably extend into other fields of administrative law. That one may be denied the right to challenge in court the legality of a final administrative order presents a threat to the liberties of all the people. Indeed, in addition thereto, it raises a clear and present danger to the judiciary, that it can be destroyed by an administrative hydra over which the courts lose all control.

Whatever may have been the reasons of policy that were proclaimed as justification for denial of judicial trial in the prosecutions of those thousands of men it is clear that no such specious grounds exist in the cases at bar. Here the records show that petitioners have completed all the administrative remedies. Each finished the selective process. Each was found acceptable by the armed forces. Smith was restrained of his liberty by them until ordered discharged by the writ of *habeas corpus*.

Denial of judicial review by the courts below of the illegality of the administrative action is a grave error that seriously affects the fairness, integrity, and public reputation of judicial proceedings. Their grave departure from

the usual and accepted course in judicial proceedings deserves the reprobation of this Court rather than approbation as claimed by the Government.

The political and practical considerations of policy that have been invoked by all the courts in denying judicial review to Jehovah's witnesses convicted under the Act should never have been the concern of the courts. Policy and practical considerations are not justification for denial of a citizen's constitutional rights. Even in England, where the courts have far less power than they do in the United States, such policy considerations have been rejected. In 1770, Lord Mansfield, in *Rex* v. *Wilkes*, 4 Burr. 2527, hung a beacon light that serves well to guide this Court. He said: "It is fit to take some notice of the various terrors rung out; the numerous crowds that have attended and now attend in and about the hall, out of reach of hearing what passes in Court; and the tumults which in other places have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotion and general confusion. Give me leave to take the opportunity of this great and respectable audience, to let the whole world know that all such attempts are vain. Unless we have been able to find an error that will bear us out to reverse the outlawry it must be affirmed. The constitution does not allow reason of state to influence our judgment: God forbid it should: We must not regard political consequences how formidable soever they might be; if rebellion was the certain consequence we are bound to say, 'Fiat Justitia Ruat Coelum'." *

* "Let justice be done, though the heavens fall."

In ancient days of the primitive prototype of Jehovah's witnesses, the apostles of Christ Jesus, similar policy considerations were quickly disposed of by that sage Hebrew justice, Gamaliel, in these words, to wit, "Refrain from these men, and let them alone: for if this counsel or this work be of men, it will come to nought: but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God."—Acts 5:34-40.

The judgments of the courts below should be reversed and the indictments ordered dismissed. In the alternative, the judgments should be reversed and the causes remanded to the trial courts for new trials not inconsistent with the opinions that may be written herein.

Respectfully submitted,

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